Supreme Court, U.S.
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In The

# Supreme Court of the United States

JESSICA WILLIAMS,

*Petitioner,*

v.

STATE OF NEVADA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of Nevada**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

### A.

Whether *Arizona v. Youngblood* should be overruled because its bright-line bad faith test is neither bright nor prevents innocent defendants from being executed or imprisoned. And further, *Youngblood* distorted the *Trombetta* standard changing it from "potentially" exculpatory to "in fact" exculpatory, an impossible standard.

### B.

Whether the Double Jeopardy Clause is triggered when a defendant has been acquitted and convicted of the same offense in the same trial. As a case of first impression it impacts all state and federal DUI prosecutions.

### C.

Whether NRS 484.3795(1)(f) is unconstitutional under the Equal Protection and/or the Due Process Clause(s) of the Fourteenth Amendment of the United States Constitution.

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## PETITION FOR WRIT OF CERTIORARI

JESSICA WILLIAMS (WILLIAMS) respectfully prays that a Writ of Certiorari issue to Review the Judgment and Opinion of the Nevada Supreme Court and vacate or reverse the six (6) DUI convictions – (NRS 484.3795) on the grounds that *Arizona v. Youngblood* should be overruled and *California v. Trombetta* revisited; that the Double Jeopardy Clause is triggered when a defendant has been acquitted and convicted of the same offense in the same trial which impacts all state and federal DUI prosecutions; and whether NRS 484.3795(1)(f) is unconstitutional under the Equal Protection and/or the Due Process Clause(s) of the Fourteenth Amendment of the United States Constitution.

## OPINIONS BELOW

The Decision of the Nevada Supreme Court that gives rise to the Petition is a published Opinion heard Before the Court En Banc. It is reprinted in the Appendix ("App.") at 1-27.

## JURISDICTION

The date of the Nevada Supreme Court Opinion is August 2, 2002.

The instant Petition is filed under United States Supreme Court Rule 10.

## CONSTITUTIONAL PROVISIONS

FIFTH AMENDMENT

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War

> or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FOURTEENTH AMENDMENT

> Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATUTES INVOLVED IN THIS CASE

NRS 484.379 This Statute is incorporated within the Appendix of the Petition.

NRS 484.3795 This Statute is incorporated within the Appendix of the Petition.

## STATEMENT OF THE CASE

It was customary for juvenile offenders in Clark County, Nevada, to be ordered to perform community service. Appallingly, a number of these young people were required to participate in clean-up duties on interstate freeways. The Petitioner fell asleep at the wheel and killed six of the juveniles. The juveniles were unprotected while picking up trash, ten to fifteen feet from heavy 75 MPH traffic. The County's placement of the juveniles was found to be illegal by an Occupational Safety and Health

Administration [OSHA] investigation. The County did not challenge OSHA's findings and paid the imposed fines. Clark County was sued for wrongful death and settled for $3,500,000.

Petitioner admitted to sharing one bowl of marijuana, the equivalent of sharing approximately ½ of a marijuana cigarette, two hours prior to the accident and had taken one tablet of ecstacy twelve hours prior to falling asleep. While the accident occurred at about 1:40 P.M., on March 19, 2000, it was Petitioner's night time because of her graveyard work schedule. Without evidence of impairment, Petitioner was arrested and taken into custody for six counts of felony DUI under NRS 484.3795. Witnesses, including drivers on the highway, paramedics, emergency room nurses and doctor, and the jurors, all found Petitioner to be **not impaired.**

Petitioner was indicted on twenty-one (21) counts with the crimes of: NRS 484.3795 – (6) Felony DUI (the State relied on two separate theories to prove the DUI charge – impairment theory and the new "prohibited substance" theory); NRS 484.377 – (6) Felony, Reckless Driving; NRS 200.070 – (6) Felony, Involuntary Manslaughter; NRS 453.336 – (1) Felony, Possession of a Controlled Substance (marijuana)[1]; and NRS 453.411 – (1) Felony, Under the Influence or Use of a Controlled Substance. At trial, Petitioner did not contest the use or possession of a controlled substance.[2]

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[1] Since the accident, Nevada has made the amount of marijuana in Petitioner's possession a misdemeanor. *See* NRS 453.336(4)(a). Also, the State Constitution has been amended to allow medicinal marijuana. Article 4, section 38 of The Nevada Constitution.

[2] The Petitioner was also indicted on a misdemeanor possession of a marijuana pipe. NRS 453.566. The charge was dismissed pursuant to Petitioner's State Writ of Habeas Corpus.

The evidence and testimony at trial established that two vials of blood were drawn for each of the three time-spaced blood draws. There was a total of six vials. Three of Petitioner's blood samples were tested at the private laboratory ("APL"), regularly used by the State, on March 20, 2000. APL used substandard and unscientific testing procedures. In addition to using inadequate controls, APL did not refrigerate the blood. APL was reprimanded by the College of American Pathologists, and instructed to adhere to guidelines "in order to provide quality laboratory results."[3] Petitioner did a retest of her blood because of APL's substandard and unscientific testing. Petitioner's results were exculpatory. Shockingly, Petitioner's Counsel learned on the sixth day of trial, during the Defense Case in Chief, that *after* the State had tested the blood, **all six vials were left unrefrigerated**. THC becomes unstable when not refrigerated.[4] The State unfairly used its failure to refrigerate Petitioner's blood as a tactical advantage by discrediting Petitioner's exculpatory results. Petitioner's Counsel immediately filed a Motion to Suppress the State's alleged blood test results because of the State's failure to preserve the blood evidence. The Trial Judge declined to hear Petitioner's Motion before the case was submitted to the jury yet later admitted that his decision was in error because the Motion was timely. *See* NRS 174.125(1) (all timely motions to suppress must be heard before the jury gets the case). *See* also, NRS 174.125(3)(b),

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[3] The Nevada Supreme Court denied Petitioner's Motion to Expand the Record to include the report issued by the College of American Pathologists. *See* App. 48.

[4] *Journal of Analytical Toxicology*, Vol. 8, September/October 1984. "Stability of Delta 9 Tetrahyrocannabinol (THC), 11-Hydroxy-THC, and 11-Nor-9-Carboxy-THC in Blood and Plasma," Johnson, Jennison, Peat and Folz.

handling of untimely motions is discretionary. Since Petitioner's Motion was timely, the Trial Court's failure to hear it was plain error. The Nevada Supreme Court's review of this issue was erroneous. The Nevada Supreme Court ignored the timely Motion as well as the Trial Court's admission that it should have heard the Motion before the jury was given the case. *See* App. 24-26.

Sound forensic practice requires blood samples to be refrigerated, especially the unopened vials which are customarily for the defense. *See Trombetta's fn* 11, *infra.* The Trial Judge stated, " . . . the Court finds that there could be prejudice to the Defense here because the blood was not refrigerated then initially by APL." However, relying on *Youngblood*, *infra*, and *Trombetta*, *infra*, the Trial Court denied Petitioner any relief whatsoever. The Nevada Supreme Court affirmed.

The record shows that Petitioner was acquitted on the six NRS 484.3795 DUI offenses. The record also shows that Petitioner was found guilty of the six NRS 484.3795 DUI offenses. **Petitioner has been acquitted and found guilty of NRS 484.3795 – the same offense in the same trial**. As a case of first impression it has significant impact on all state and federal DUI trial prosecutions. The prosecution cannot be allowed to divide a DUI offense into multiple theories to avoid double jeopardy protection. The six convictions of NRS 484.3795 violate the Fifth Amendment Double Jeopardy Clause. The Nevada Supreme Court conceded that there was only one charge and two theories to prove that charge, yet, the Court erroneously denied Petitioner relief. *See* App. 19.

Petitioner challenged the constitutionality of NRS 484.3795(1)(f) as violative of Equal Protection, citing *Love v. State*, 271 Ga. 398, 517 S.E.2d 53 (Ga. 1999). The Trial Court denied Petitioner's Motion finding the Statute a valid exercise of the legislative power. The Nevada Supreme Court affirmed. *See* App. 6-11. Petitioner challenged

the constitutionality of NRS 484.3795(1)(f) as violative of Substantive Due Process. The Trial Court denied Petitioner's Motion finding the Statute a valid exercise of the legislative power. The Nevada Supreme Court affirmed. *See* App. 11-20.

At the conclusion of the nationally televised trial, Petitioner was acquitted of the charges of DUI (under the impairment theory), Reckless driving and Involuntary Manslaughter. Petitioner was convicted of the same six (6) DUI's (under the "prohibited substance" theory), Use of a Controlled Substance, and Possession of a Controlled Substance. On the DUI charges, Petitioner was sentenced to a minimum of eighteen (18) years and a maximum of forty-eight (48) years. **Petitioner must serve at least eighteen (18) years before being eligible for parole.** While a significant number of motions were heard at trial, only those pertaining to Petitioner's Writ of Certiorari are addressed herein.

## REASONS FOR GRANTING THE WRIT

### I.

### *ARIZONA v. YOUNGBLOOD* SHOULD BE OVERRULED AND *CALIFORNIA v. TROMBETTA* REVISITED

**A. The State's failure to preserve Petitioner's blood when the blood was the sole evidence used to convict Petitioner is fundamentally unfair and violates the Due Process Clause under the Fourteenth Amendment of the United States Constitution.**

Petitioner was acquitted of NRS 484.3795 (impairment theory) and convicted of NRS 484.3795 ("prohibited

substance" theory). The latter theory is based solely on the blood test readings.[5] Clearly, Petitioner's blood is constitutionally material. The State's testing of Petitioner's blood was substandard and unscientific.[6] The laboratory used by the State ("APL") was reprimanded by the College of American Pathologists for substandard testing. *See fn.* 3. Because of the State's unscientific analysis, Petitioner had her blood retested by the nationally recognized toxicology laboratory at the University of Utah. The results were exculpatory. All THC levels were found to be below the legal level. The marijuana metabolite (THC-COOH) testing showed no accuracy or precision, thus was scientifically useless as evidence against Petitioner. Shockingly, Petitioner learned on the sixth day of trial, during the Defense Case in Chief, that the State failed to refrigerate her blood.[7] Petitioner's exculpatory results were rendered worthless based on a scientific study used by the State.

The "stability study" by Dr. Peat showed that THC levels significantly changed in two (2) months for blood that has not been refrigerated. This meant that at the

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[5] *See* NRS 484.379(3) and NRS 484.3795(1)(f), reproduced in App. 32-36.

[6] *Trombetta, infra* noted that materiality is not static. "The materiality of breath samples is directly related to the reliability of the Intoxilyzer itself. The degree to which preserved samples are material depends on how reliable the Intoxilyzer is." *Id.* at *fn.* 10. Since APL's testing was sub-standard and unscientific, Petitioner's blood was highly material.

[7] *Trombetta, infra*, noted the State's obligation for preserving urine and blood for retesting by defendants. This Court said, "Respondents could also have protected themselves from erroneous on-the-scene testing by electing to submit to urine or blood tests, see n.2, *supra*, **because the State automatically would have preserved urine and blood samples for retesting by respondents.**" [Emphasis added.] *Id.* at *fn.* 11.

time Petitioner was to be arraigned in State district court, May 22, 2000, any retest of the blood for marijuana was scientifically unavailable because **the State did not refrigerate the blood.**[8] The State used its laboratory's failure to preserve the blood as a tactical advantage by effectively impeaching Petitioner's exculpatory results. The Nevada Supreme Court took the erroneous position that the State never destroyed the blood evidence – instead pointing the finger at APL. *See* App. 23-24. Clearly, the State is the principal and its laboratory merely the State's agent. By having full custody of the exculpatory and mitigating blood evidence, the State had access to it at all relevant times. Relying on *Arizona v. Youngblood*, 488 U.S. 55 (1988), and *California v. Trombetta*, 467 U.S. 479, 488 (1984), both the Trial Court and Nevada Supreme Court denied Petitioner relief. *Youngblood* has not only been wrongfully decided, it distorted *Trombetta* rendering *Trombetta* meaningless in affording Petitioner a right to a fair trial.[9]

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[8] NRS 484.389(3) requires the State to provide "full information regarding the evidentiary test." Petitioner requested the testing documentation as early as April 10, 2000. The State did not provide the documentation until January 3, 2001, one (1) month before trial. The Nevada Supreme Court cavalierly ignored these facts saying, "Williams did not request a retest of her blood sample for over ten (10) months after it was drawn." App. at 24. This ignores Petitioner's early request for the State's testing documentation as well as the fact that **the blood was destroyed** before Petitioner was even arraigned.

[9] *Youngblood* interpreted *Trombetta* to mean that before a defendant has a constitutional due process claim because of lost or destroyed evidence he must prove that the lost or destroyed evidence was **in fact** exculpatory. *See, Youngblood* at asterisk at 56. As the Trial Judge in Petitioner's case correctly noted, "perhaps it's an impossible task. . . . " It **is** an impossible standard because it requires proof of a negative. For example, a defendant cannot prove that a knife found at the crime scene did not contain his fingerprints without testing the knife itself.

(Continued on following page)

The cornerstone of American jurisprudence is that the government will treat its people fairly. Our philosophy is founded on the principle that all individuals are guaranteed a fair trial when accused of a crime. A fair trial starts with the government's obligation to gather material evidence relating to the alleged offense.[10] Equally important is the government's responsibility to preserve the evidence once gathered or, at a minimum, notify the court or defense prior to its intended destruction. To do otherwise severely disadvantages the accused in defending the government's charge. The likely result is imprisonment or execution of innocent people. Destruction of material exculpatory evidence makes a fair trial impossible. Logical precedent needs to be set forth so that judicial reasoning results in fair and correct determinations. There exists a constitutional obligation to preserve "evidence that might be expected to play a significant role in the suspect's defense." *Trombetta* at 488. This Court has the ultimate power to set precedent for leveling the playing field between adversaries, affording the accused a fair trial.

Beginning in 1963, in the case of *Brady v. Maryland*, 373 U.S. 83 (1963), this Court made the first in a series of

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*See United States v. Bryant*, 439 F.2d 642, 647-48, (D.C.Cir. 1971) nullified by *Youngblood* in *In re Sealed Case*, 99 F.3d 1175, 1178 (D.C.Cir. 1996). *Trombetta* must be revisited and *Youngblood* overruled. Petitioner was denied relief under *Trombetta* because she did not prove that her blood would **in fact** be exculpatory.

[10] There are three situations in which lost or destroyed evidence can take place: (1) The state has failed to gather evidence; (2) The state gathered the evidence but did not test it and failed to preserve it for the defense, and (3) The state gathered the evidence, tested it and failed to preserve it for the defense. Evidence that has not been gathered by the police or prosecutor was addressed in *State v. Ware*, 118 N.M. 319, 881 P.2d 679 (N.M. 1994). The balancing approach used in *Ware* can serve as a model for this Court for all three situations referred above.

decisions "in what might loosely be called the area of constitutionally guaranteed access to evidence." *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982). In *Brady*, a due process violation focused on the materiality of the evidence "irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. Since *Brady*, this Court has decided other cases involving suppression by the prosecution of evidence favorable to an accused. Again, good faith or bad faith of the police or prosecutor is irrelevant. *See United States v. Agurs*, 427 U.S. 97 (1976); *United States v. Bagley*, 473 U.S. 667 (1985); *Kyles v. Whitley*, 115 U.S. 1555 (1985); and *California v. Trombetta*, *supra*.

The *Trombetta* Court referred to *People v. Hitch*, 12 Cal.3d 641, 117 Cal.Rptr. 9, 527 P.2d 361 (1974), as a noteworthy decision. The Court's reasoning was that the *Hitch* decision extrapolated from *Brady's* disclosure requirement an additional constitutional duty on the part of prosecutors to preserve potentially exculpatory evidence. *Trombetta*, at 484 *fn.* 5. In 1988, this Court handed down *Arizona v. Youngblood*, *supra,* a decision that significantly changed the landscape of due process law as it relates to lost or destroyed evidence in a criminal case. *Youngblood* also changed the *Trombetta* standard from "potentially" exculpatory to "in fact" exculpatory, an impossible standard to meet. *See* again, *Youngblood*, at asterisk, at U.S. 56.

*Youngblood's* majority opinion created a rule with no basis in historical or legal precedent that bad faith must be shown on the part of the police or prosecutor in order to have a valid claim for a violation of federal due process under the Fourteenth Amendment of the Constitution. *Youngblood's* flaw is that it hinders not heightens logical reasoning, a necessary ingredient in making a trial fair. The majority in *Youngblood* wrongly focused on the character of the custodian of the evidence and not the

character of the evidence itself. Logical reasoning shows that *Youngblood's* bright-line bad faith test is neither bright nor prevents innocent defendants from being executed or imprisoned. *Youngblood* at 66, Justices BLACKMUN, BRENNAN and MARSHALL, dissenting. The excellent law review article, Daniel R. Dinger, *State Rejections of the United States Supreme Court Decision in Arizona v. Youngblood*, 27 AM. J. CRIM. L. 329 (2000), convincingly and irrefutably argued that *Youngblood* was wrongfully decided and should be overruled. *Youngblood* has contributed to the problem of innocent people being convicted of crimes. *Youngblood* must be overruled.

*Youngblood* leads to unjust results. **YOUNGBLOOD, HIMSELF, WAS WRONGFULLY CONVICTED.** After serving nearly a decade in prison, a DNA test conclusively exonerated him. *See* App. 42-45. Youngblood's innocence makes a mockery of the bad faith standard used by this very Court, this very day. No matter how material or important the lost or destroyed evidence may be for the defendant, the bad faith test controls. Equally true, and quite ironic, are those cases where the guilt of a defendant is overwhelming, yet the prosecution ends if evidence was lost or destroyed in bad faith. Destruction of evidence does not negate its materiality. The *Youngblood* dissent observed, "Regardless of the intent or lack thereof, police action that results in a defendant's receiving an unfair trial constitutes a deprivation of due process." *Id.* at 62. Under *Youngblood*, the innocent go to prison and the criminals go free!

*Youngblood* is further flawed in that it encourages the Government to "lose" or never gather material evidence because it is virtually impossible for a defendant to prove

bad faith.[11] At a minimum, *Youngblood* encourages shoddy handling of material evidence, evidence that could exonerate a defendant. The better approach to lost or destroyed evidence is a balancing test where materiality plays a significant role. *See* again "Daniel R. Dinger, *State Rejections of the United States Supreme Court Decision in Arizona v. Youngblood.*" A number of states, most notably, Alaska, Delaware and Tennessee, have focused on the character of the evidence, not the character of the evidence custodian.[12]

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[11] *Youngblood* provides no guidance or criteria from which bad faith can be objectively discerned. Bad faith under *Youngblood* is too subjective. Petitioner's case is a clear example:

1. The State knew or should have known that Petitioner's blood was not being refrigerated yet did nothing about it.

2. The State had its test results and clearly gained a tactical advantage in preventing Petitioner's retest.

3. The record shows that the State's testing of the blood was unscientific.

4. The State used the blood results against Petitioner, unlike *Youngblood*.

5. Petitioner was denied a *Youngblood* instruction.

6. Petitioner's expert was never given the opportunity to test a valid sample of her blood, unlike *Youngblood*.

7. At the time of Petitioner's arraignment, any valid retesting was destroyed because the State failed to preserve the blood.

8. The destruction of Petitioner's blood was not "routine,"unlike *Youngblood*.

9. Three of the destroyed blood vials were for Petitioner to retest.

10. The State waited to see the results of Petitioner's retesting and if unfavorable to Petitioner, the lack of refrigeration issue would never have been raised by the State.

This is textbook bad faith.

[12] Approximately thirteen states have rejected *Youngblood* by use of their state constitutions.

These courts have used a balancing test weighing culpability, materiality and prejudice in light of the entire record.

Justice Stevens first suggested this approach in his concurrence in *Youngblood*. Justice Stevens argued that courts must evaluate the lost evidence in the context of the entire record in order to reflect the judicial system's "overriding concern with the justice of the finding of guilt." 488 U.S. at 59. As Justice Stevens concluded, "[T]here may well be cases in which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of evidence is nonetheless so critical to the defense as to make a criminal trial fundamentally unfair." *Id.* at 60. Justice Stevens' approach has been expressly adopted by numerous states. *See Gurley v. State*, 639 So.2d 557 (Ala. Crim. App. 1993); *Thorne v. Dept. of Pub. Safety*, 774 P.2d 1326 (Alaska 1989); *People v. Frye*, 18 Cal.4th 894 (1998); *State v. Morales*, 232 Conn. 707 (1995); *Lolly v. State*, 611 A.2d 956 (Del. 1992); *Brown v. United States*, 718 A.2d 95 (D.C. 1998); *Spaulding v. State*, 195 Ga. App. 420 (1990); *State v. Matafeo*, 71 Haw. 183 (1990); *State v. Fain*, 116 Idaho 82 (1989); *People v. Newberry*, 166 Ill.2d 310 (1995); *Commonwealth v. Henderson*, 411 Mass. 309 (1991); *State v. Schmid*, 487 N.W.2d 539 (Minn. Ct. App. 1992); *Cook v. State*, 114 Nev. 120 (1998); *State v. Smagula*, 133 N.H.2d 600 (1990); *State v. Riggs*, 114 N.M. 358 (1992); *People v. Burch*, 669 N.Y.S.2d 299 (2d Dept. 1998); *State v. Zinsli*, 156 Or. App. 245 (1998); *State v. Vanover*, 721 A.2d 430 (R.I. 1998); *Little v. State*, 971 S.W.2d 729 (Tex. App. 1998); *State v. Basta*, 966 P.2d 260 (Utah Ct. App. 1998); *State v. Delisle*, 648 A.2d 632 (Vt. 1994); *State v. Potts*, 93 Wash. App. 82 (Div.3 1998); *State v. Osakalumi*, 461 S.E.2d 504 (W.Va.1995). Under *Youngblood*, the Petitioner in this case was denied relief.

Petitioner's futile circumstances parallel Justice Stevens' concurring opinion in *Youngblood*. The State's unscientific and substandard blood test was the **only**

evidence used to convict Petitioner.[13] The Trial Judge admitted that Petitioner may very well have been prejudiced by the State's failure to preserve the blood evidence, yet found no bad faith on part of the police or government relying on *Youngblood*. The Trial Judge was correct – the Petitioner was irreparably prejudiced. The State Supreme Court ignored the prejudice and also found no bad faith relying on *Youngblood*. Petitioner is precisely that case alluded to by Justice Stevens. Since *Youngblood* and *Trombetta* afforded Petitioner no relief, she was sentenced to a considerable number of years in prison – a minimum of eighteen (18) years and forty-eight (48) year maximum.[14] Since the State failed to preserve the blood, Petitioner's

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[13] Scientifically, marijuana testing, compared to alcohol analysis, is extremely complex and challenging. The State's own expert makes this point clear:

Q: [By Mr. Booker, D.A.] Doctor, is there a particular difficulty associated with the testing of THC or marijuana that is not associated with the testing of alcohol?

A: Yes, I think I could agree with that statement.

Q: If you could, could you tell us why?

A: There are a great many laboratories that can test for alcohol and it's a relatively simple analysis analytically speaking. Whereas, the components of marijuana that need to be tested for, and I would think the minimum that a lab would want to do would be THC, tetrahydrocannabinol, and the corresponding carboxy metabolite of THC. **It is certainly a challenging analysis.**

[14] Involuntary manslaughter requires proof of gross negligence and has a penalty of one (1) to six (6) years – probationable. Reckless driving requires "willful and wanton" conduct and has a penalty of one (1) to six (6) years – probationable. Driving Under the Influence ("prohibited substance" theory) requires no impairment or culpable act (strict liability) and has a penalty of two (2) to twenty (20) years – no probation possible. Ironically Petitioner received a harsher sentence for being not impaired.

lengthy incarceration is fundamentally unfair under the Fourteenth Amendment Due Process Clause.

The Due Process Clause of the Fourteenth Amendment mandates that criminal prosecutions must comport with "prevailing notions of fundamental fairness." *Trombetta* at 485. *Trombetta* also affirmed, "We have long interpreted this standard of fairness to require that criminal defendants be afforded a ***meaningful opportunity*** to present a ***complete*** defense." *Id.* at 485. [Emphasis added.]. The State's failure to refrigerate Petitioner's blood after the prosecution's unscientific marijuana testing does not comport with "fundamental fairness." The State's destruction of evidence prevented Petitioner from having "a meaningful opportunity to prevent a complete defense." *Trombetta* at 485.

A fair trial can never occur unless a defendant's right to due process of law is recognized and followed. This Court has supported this philosophy. In *Berger v. United States*, 295 U.S. 78 (1945), the Court wrote that a prosecutor,

> is the representative not of an ordinary party to a controversy, but . . . of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. *Id.* at 88.

In contradiction to *Berger*, in Petitioner's case the State adopted the philosophy that it "shall win" at all costs.[15] See

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[15] It should be noted that the State had Dana Russell, a forensic specialist at APL, testify she analyzed Petitioner's blood. This was completely false and the State knew it as evidenced by the fact that the prosecutors never offered to the jury testing documentation during Dana's testimony. Petitioner learned at the end of her trial that two unknown (first name only) and one phantom (no name) employees of APL

(Continued on following page)

also, *Campbell v. United States*, 365 U.S. 85 (1961) (quoting *Berger*, 295 U.S. at 88). And finally, with respect to a defendant's right to due process, this Court in *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979) wrote:

> The responsibility of the prosecutor as a representative of the public surely encompasses a duty to protect the societal interest in an open trial. But this responsibility also requires him to be sensitive to the due process rights of a defendant to a fair trial. *A fortiori*, the trial judge has the same dual obligation. *Id.* at 384, *fn.* 12.

Under the balancing approach a court is permitted to engage in "a search for truth," under *Youngblood* an "adversarial game" is encouraged. *United States v. Perry*, 471 F.2d 1057, 1063 (D.C. Cir. 1972), *Youngblood* must be overruled and *Trombetta* must be revisited.

## II.

## THE DOUBLE JEOPARDY CLAUSE IS TRIGGERED WHEN A DEFENDANT HAS BEEN ACQUITTED AND CONVICTED OF THE SAME OFFENSE IN THE SAME TRIAL. (THIS APPEARS TO BE A CASE OF FIRST IMPRESSION.)

NRS 484.379 and NRS 484.3795 are Nevada's Driving Under the Influence Statutes.[16] The allowable unit of

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performed the testing – not Dana Russell. There was no evidence that these three individuals were even qualified to do the testing on Petitioner's blood. False or perjured testimony violated Petitioner's Fourteenth Amendment Due Process rights. *See Agurs, supra* at 103; *Giglio v. United States*, 405 U.S. 150, 154 (1972). The Nevada Supreme Court disposed of this issue merely saying that it "lacked merit." *See* App. 26.

[16] Petitioner Williams was charged with six (6) counts of violating NRS 484.3795. The "discrete bases of liability" listed in section (1)(f) of NRS 484.3795 refers to NRS 484.379(3).

prosecution under NRS 484.3795 is defined as a *single* offense of Driving Under the Influence. The offense of Driving Under the Influence has been divided into several "discrete bases of liability." *See* NRS 484.3795(1)(d) and (f).[17] Nevada case law makes clear that NRS 484.3795 (1)(d) and (f) are not separate offenses; they are separate theories proving the same (identical here) offense setforth in NRS 484.3795. In *Dossey v. State*, 114 Nev. 904, 964 P.2d 782 (1998), the Court held, "We conclude that the legislature intended the subsections of this statute to define alternative means of committing a *single* offense, not separable offenses permitting a conviction of multiple counts based on a single act." *Id.* at 909. (Emphasis added.) *See* also, *Long v. State*, 109 Nev. 523, 528, 853 P.2d 112, 115 (1993); *accord Blume v. State*, 112 Nev. 472, 474, 915 P.2d 282, 284 (1996). The Nevada Supreme Court maintained this position below. "We conclude that NRS 484.3795(1)(d) and (f) constitute alternative means of committing **an** offense. . . . "[18] App. 19. (Emphasis added.) NRS 484.3795 defines a single offense and alternative ways to commit that offense.

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[17] This Court in *Sanabria, infra,* refers to alternative means or theories of prosecution as "discrete bases of liability." *See Id.* at 72.

[18] The Nevada Supreme Court's reference to *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180 (1932) is clearly misplaced. Petitioner's case involves only a single statute. *See Sanabria, infra, fn.* 24; *State v. White*, 254 Neb. 566, 577 N.W.2d 741, 745 (Neb. 1998). Further, *Blockburger* is never to be used when the legislative intent of a statute is known. *See Missouri v. Hunter*, 459 U.S. 359, 103 S.Ct. 673 (1983). Nevada's High Court admits that legislative intent of NRS 484.3795 is clear. "We conclude that the legislature intended the subsections of this statute to define alternative means of committing a *single* offense. . . . " *Dossey* at 909. (Emphasis added.) Reliance on *Blockburger* to defeat Petitioner's double jeopardy claim was plain error.

The State alleged that Petitioner Williams was guilty of violating NRS 484.3795 by either of two discrete bases of liability listed under NRS 484.3795(1)(d) and (f) respectively. When the Jury returned verdicts based on NRS 484.3795(1)(d), Petitioner Williams was acquitted of NRS 484.3795.[19] When the Jury returned verdicts based on NRS 484.3795(1)(f), Petitioner Williams was found guilty of NRS 484.3795. Petitioner Williams has been acquitted and convicted of the same identical offense in a single trial.[20] Contrary to the Nevada Supreme Court's decision below, this violates the Fifth Amendment Double Jeopardy Clause.

The Double Jeopardy Clause of the United States Constitution provides that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb." U.S. Constitution, Fifth Amendment. The Double Jeopardy Clause has application to the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056 (1969); *Illinois v. Vitale*, 447 U.S. 410, 415, 100 S.Ct. 2260, 2264 (1980). The primary purpose of the Double Jeopardy Clause is "to preserve the finality of judgments," *Crist v. Bretz*, 437 U.S., at 33, 98 S.Ct., at 2159, as well as the "integrity" of judgments, *United States v. Scott*, 437 U.S., at 92, 98 S.Ct., at 2194. Petitioner's acquittal of NRS 484.3795 terminated the criminal prosecution as to that charge and the finding of guilt on the same offense is barred by the Fifth Amendment Double Jeopardy Clause. *See Sanabria v. United States*, 437 U.S.

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[19] The Nevada Supreme Court admits that Petitioner Williams was acquitted of NRS 484.3795. "The jury returned not guilty verdicts on the six counts of driving while under the influence. . . . " App. 3.

[20] However, the "same" offense requirement for Double Jeopardy protection need not be the identical offense. *See fn.* 6 in *Brown v. Ohio*, 432 U.S. 161, 167, 97 S.Ct. 2221, 2226 (1977).

54, 98 S.Ct. 2170, 57 L.Ed.2d 43 (1978); *United States v. Scott*, 437 U.S. 82 (1978); *Green v. United States*, 355 U.S. 184, 187 (1957); and *Ball v. United States*, 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300 (1896). As this Court in *Scott*, *supra*, said " . . . the law attaches particular significance to an acquittal." *Id.* at 91. Even a baseless or erroneous acquittal ends the prosecution. This Court in *Sanabria*, *supra*, held,

> The fundamental nature of this rule [that a verdict of acquittal may not be reviewed] is manifested by its explicit extension to situations where an acquittal is "based upon an egregiously erroneous foundation." *Id.* at 64 (Cites omitted.)

Petitioner cited *Sanabria* to the Court below and it was completely ignored. *Sanabria* compels relief because state courts have "decided an important federal question in a way that conflicts with relevant decisions of this Court." Supreme Court Rule 10(c).[21]

*Sanabria* held that if a defendant is acquitted of the offense based on one of the several "discrete bases of liability," it is an acquittal of the offense. "That the trial court disregarded the Government's allegation of numbers betting does not render its acquittal on the horse betting theory any less an acquittal on the 'offense' charged." *Id.* at 72. Equally true, Petitioner's acquittal on the impairment theory is no less an acquittal of NRS 484.3795, the offense charged. *Sanabria* stated, "The Double Jeopardy Clause is not such a fragile guarantee that . . . its limitations [can be avoided] by the simple expedient of dividing a single crime into a series of . . . 'discrete bases of liability.'"

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[21] Hawaii and Nevada allow the prosecution to divide the DUI offense into several "discrete bases of liability" resulting in multiple prosecutions in a single or successive trial.

(Cites omitted.) *Id.* at 72. *Cf, State v. Dow*, 806 P.2d 402, 405-07 (Haw. 1991) (Holding that an acquittal based on one "discrete bases of liability" is no Double Jeopardy bar to prosecution based on another "discrete bases of liability" for the same offense.) *Dow* violates *Sanabria*. The Nevada Supreme Court's reliance on *Dow* and rejection of *Sanabria* is constitutionally wrong as well as its finding that double jeopardy requires a second trial or multiple punishments. *See United States v. Blount*, 34 F.3d 865 (9th Cir. 1994) (the Government argued that Blount " . . . was not subjected to a 'second trial' . . . " thus the Double Jeopardy Clause was not triggered. *Blount* said, "this argument is not persuasive." *Id.* at 868.); *In re Bradley*, 318 U.S. 50, 63 S.Ct. 470 (1943).[22] *See also*, *United States v. DiFrancesco*, 449 U.S. 117, 101 S.Ct. 426 (1980), citing *Green v. United States*, *supra*, ("The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial *and possible conviction more than once* for an alleged offense. . . . ") *Id.* at 127. (Emphasis added.)

This appears to be a case of first impression in this Court.[23] While the rationale of *Sanabria* supports

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[22] *Bradley* dealt with alternative punishments for a single offense in a single trial. Relying on the finality of a judgment attendant to the Double Jeopardy Clause, this Court held that satisfaction of one punishment nullified the other punishment. Equally true, Petitioner's acquittal of a single offense in a single trial nullified the conviction on the same offense. An acquittal mandates finality. *Bradley* said, " . . . the power of the court was at an end." *Id.* at 52. ( *fn.* 1 omitted.)

[23] Williams was a case of first impression in Nevada, *cf. Peck v. State*, 116 Nev. 840, 7 P.3d 470 (Nev. 2000) (Jury foreman signing verdict forms finding Peck "both guilty and not guilty of Count I, Sexual Assault" is not an acquittal because "the verdict was not accepted by the district court. . . . ") *Id.* at 474, 475. Unlike *Peck*, the verdict of acquittal was accepted by the district court in Petitioner Williams' case.

Petitioner's double jeopardy claim, Petitioner's facts are different. Unlike *Sanabria*, Petitioner Williams was **acquitted and convicted** of the **same offense** in the **same trial.** However, the Nevada Supreme Court ignored the acquittal and allowed the sentences under NRS 484.3795 to stand. This made a nullity of the finality and integrity of the jury's verdict of acquittal. Further, Petitioner was subjected to **possible** punishment and conviction twice for the same identical offense. Petitioner's acquittal triggered double jeopardy protection. "Where the clause does apply, 'it's sweep is absolute.' *Burks v. United States*, 437 U.S., at 11, n.6, 98 S.Ct., at 2147, n.6." *DiFrancesco, supra*, at 131. Petitioner's request for relief is meritorious and the Writ of Certiorari should be granted.

## III.

## NRS 484.3795(1)(f) IS UNCONSTITUTIONAL

### A. EQUAL PROTECTION

#### a. The Requirements Of An Equal Protection Attack.

The United States Constitution states: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Fourteenth Amendment. A criminal statute violates Equal Protection if it treats similarly situated persons differently for reasons not rationally related to a legitimate government interest. *Reed v. Reed*, 404 U.S. 71, 75-76, 92 S.Ct. 251 (1971). There are two prongs to an evaluation of legislation under an Equal Protection claim. Initially, the claimant must establish that he is similarly situated to members of the class who are treated differently from him. Next, the claimant must

establish that there is no rational basis for such disparate treatment.[24] The Equal Protection Clause requires legislation to have a basis in fact and relate to the objective sought to be accomplished.

**b. The Classification Of Drivers With Low Levels of Residual Marijuana In Their Blood As Unlawfully Impaired Drivers Is Not Rationally Related To Traffic Safety, Thus NRS 484.3795(1)(f) Is Unconstitutional.**

NRS 484.3795(1)(f) violates Equal Protection because the class of persons it singles out for punishment are unimpaired drivers with trace amounts of marijuana or its metabolite in their blood or urine who pose no threat to traffic safety.[25] Once marijuana is ingested, THC and its metabolites are detectable in the user's blood for days and in the urine for a minimum of several weeks. Since evidence of marijuana remains in the body for protracted lengths of time, a positive drug screen after a traffic stop or incident does not establish that the driver was under

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[24] Petitioner believes that "strict scrutiny" should be the standard of review. Once a person is given a driving license by the State, he has an unenumerated constitutional right to drive. *See Bell v. Burson*, 402 U.S. 535 (1971); *Shapiro v. Thompson*, 394 U.S. 618 (1969). However, the challenged law here fails to pass constitutional muster under a "rational basis" standard of review. Contrary to the State Supreme Court statement, Petitioner's Counsel did not concede otherwise.

[25] Drug impairment and mere drug use are separate issues. It is illegal in Nevada to merely *use* illicit drugs. *See* NRS 453.411. The DUI statutes address *impairment*. *See Cotter v. State*, 103 Nev. 303, 738 P.2d 506 (1987).

the influence of the drug while driving.[26] The effects of marijuana on driving ability disappear shortly after the initial euphoric state wears off.

The Government determined that marijuana does not impair driving performance at low doses, and in fact enhances driver safety once the effects of the drug are felt by the user. *Marijuana and Actual Driving Performance, Effects of THC on Driving Performance*, U.S. Department of Transportation, National Highway Traffic Safety Administration. DOT HS 808 078 (November 1993).[27] Low doses of marijuana have approximately the same effect on driving ability as many non-prescription decongestant drugs.[28] Even at high doses, marijuana does not impair driving ability as much as alcohol. The study showed that drivers administered the *highest* dosage of THC showed

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[26] "[A] positive urinalysis can indicate either recent use or use that occurred several weeks earlier. Multiple sampling may be necessary to differentiate the results. Thus, a single positive urine test does not mean that a person was under the influence of marijuana at the time the urine specimen was collected." Julien, Robert M., *A Primer Of Drug Action*, 7th ed. (W.H. Freeman, New York 1995), p. 340.

[27] The degree of psychomotor impairment is dependant on the dose of the THC absorbed by the brain; however, the psychomotor impairment associated with use of marijuana is minimal, and is compensated for when driving, such that the impairment is irrelevant to driving skills. It has been shown that persons intoxicated by marijuana are often safer drivers than they would normally be because of their over-awareness of the effects of the drug. "Drivers under the influence of marijuana retain insight in their performance, and will compensate where they can, for example, by slowing down or increasing effort. As a consequence, THC's adverse effects on driving performance appear relatively small. . . . Of the many psychotropic drugs, licit and illicit, that are available and used by the people who subsequently drive, marijuana may well be among the least harmful."

[28] The 1993 NHTSA study shows the effect of "Benadryl" and "Actifed," two common non-prescription drugs, to be worse than THC in terms of their effect on road tracking performance.

impairment equivalent to a 0.08% blood alcohol level, below Nevada's "per se" level of 0.10%.[29]

Extensive scientific studies over many years show persons at 0.10% blood alcohol content to be almost always too intoxicated to drive. *See Burg v. Municipal Court*, 673 P.2d 732 (Col. 1983). Conversely, drivers with low levels of marijuana or metabolites in their blood or urine are almost, if not always, unimpaired and singling them out for prosecution is arbitrary and irrational.[30] NRS 484.3795(1)(f) violates the Equal Protection Clause of the Constitution.

### c. NRS 484.3795(1)(f), The "Per Se Drug Theory," Violates The Equal Protection Clause By Arbitrarily Changing The Burden Of Proof Of Guilt For Prescription Marijuana Users.

NRS 484.3795 imposes two different burdens of proof for marijuana-related DUI prosecutions. Drivers who have prescriptions to use marijuana[31] can only be convicted of DUI if they are proven to have driven while under the

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[29] The 1993 NHTSA study summarized all available comparative studies and concluded that "THC's effects after doses of 300 ug/kg [highest dose] never exceed alcohol's at BACs of 0.08%."

[30] Petitioner believes any "per se" drug legislation, as alcohol, must be rationally related to show impairment.

[31] Marinol (synthetic marijuana THC) can be obtained by prescription in Nevada and elsewhere. Nevada has recently amended its constitution to allow marijuana for medical reasons, *See* Nevada Constitution, Article 4 section 38. Other jurisdictions, such as Georgia and California allow medicinal use of marijuana. The State of Nevada will not prosecute those who have prescriptions for marijuana from other states. Lastly, "marijuana" use is legal in Nevada, even without a prescription. *See* NRS 453.096(2); *Sessions v. State*, 106 Nev. 1986, 789 P.2d 242 (1990).

influence of the drug to the extent that it *impaired* their ability to drive safely. Drivers who have used non-prescription marijuana are guilty of DUI if they drive **unimpaired**.

The statutory segregation of prescription and non-prescription users is not rationally related to traffic safety, the purpose of the DUI law. The Statute does not further the cause of traffic safety by treating prescription marijuana users differently. Individuals who have prescriptions for marijuana can be driving with much greater amounts of marijuana in their system than non-prescription users without fear of criminal prosecution.

Neither can it be said that illegal drug users as a class are a grave risk to traffic safety such that they may lawfully be discriminated against in traffic laws wherever possible. There is no safety-related reason to impose strict liability on non-prescription drug users for DUI without requiring proof of impairment. In the context of traffic safety it is as nonsensical as imposing strict liability for DUI on those who drive after cheating on their taxes or drivers who have blue eyes.

By setting different standards of proof, this Statute punishes the status of being a non-prescription marijuana user without any traffic-safety related reason for doing so. It is arbitrary and unlawful. The Georgia Supreme Court struck down its DUI drug statute on this very ground.

In *Love v. State*, 271 Ga. 398, 517 S.E.2d 53 (Ga. 1999), a Georgia statute was deemed to violate Equal Protection by arbitrarily changing the burden of proof of guilt for prescription marijuana users as compared to those who did not have a prescription. Expert testimony given in *Love* stated that the pharmacological effects of prescription marijuana are no different from the effects of non-prescription marijuana. Therefore, "the statute's disparate

treatment of users of legal and illegal marijuana is predicated on the purpose for which marijuana is used – legal marijuana users are not subject to prosecution for the per se prohibition, while illegal users of marijuana are." (Emphasis in original.) *Id.* at 57.

The *Love* Court, in considering the rational relationship between the statute and the legitimate state purpose of public safety and the fact that the effects of legally-used marijuana are indistinguishable from the effects of illegally-used marijuana, was "unable to hold that the legislative distinction between users of legal and illegal marijuana is directly related to the public safety purpose of the legislation. . . . " *Id.* at 57. *Love* found the distinction arbitrary and the statute an unconstitutional denial of Equal Protection. Nevada has held to the contrary. This issue affects all fifty states.[32] Petitioner's Writ should be granted. *See* Supreme Court Rule 10(b).

## B. SUBSTANTIVE DUE PROCESS

### a. The Requirements Of A Due Process Attack.

Substantive due process guarantees that no person shall be deprived of life, liberty or property for arbitrary reasons. *Truax v. Corrigan*, 257 U.S. 312, 332 (1921). In the area of social legislation (police powers of the state) the constitutionality of a statute against a Fourteenth Amendment challenge requires that the law be "reasonable, not arbitrary, and bears a rational relationship to a legitimate state purpose." *New Orleans v. Dukes*, 427 U.S. 297 (1975); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1973).

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[32] *See* again *fn.* 31.

### b. Low Levels Of Residual Marijuana In A Person's Blood Are Not Rationally Related To Traffic Safety.

The legislative purpose behind NRS 484.3795(1)(f) is to remove impaired drivers from the roads and punish them accordingly. Clearly, the public has absolutely no legitimate interest in the prosecution of unimpaired drivers for DUI.[33] The scientific evidence proves that there is no connection between the presence of low levels of marijuana or its metabolites in the blood and impaired driving ability. "It is not possible to conclude anything about a driver's impairment on the basis of his/her plasma concentrations of THC and THC-COOH determined in a single sample." *See* again, the 1993 Department of Transporation [DOT] study. When NRS 484.3795(1)(f) is applied to persons in Petitioner's position, the Statute simply acts as punishment for merely using marijuana and has no relationship whatsoever to driving impairment. Punishing individuals for driving with two (2) and five (5) nanograms of marijuana in the blood is akin to making everyone who drives with a 0.001% of alcohol in his body guilty of DUI. Clearly, a law prohibiting the latter could not possibly pass Constitutional muster. NRS 484.3795(1)(f) must be declared unconstitutional.

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[33] Article 4, Section 17 of the Nevada Constitution prohibits the Legislature from passing legislation which punishes unimpaired drivers in a statute whose title addresses impairment only. *Klein v. Kinkead*, 16 Nev. 194 (1881); *Norcross v. Board of Comm'rs*, 22 Nev. 399, 41 P.145 (1895). The Nevada Supreme Court ignored this mandate. *Abelman v. Douglass*, 46 Nev. 121, 208 P.422 (1922).

### c. There Is No Causal Nexus Between The Ingested Substance And The Injury Or Death.

NRS 484.3795(1)(f), a newly enacted DUI theory, is unconstitutional because it fails to require a causal relationship between the ingested substance and the event leading to the injury or death of another. For example, assume that Mary Jane is driving her Ford Explorer when suddenly without warning her right front tire blows-out causing an accident which kills six people. Since Mary Jane did not legally cause the accident, there will be no civil or criminal action brought against her. However, under the same facts, add that Mary Jane smoked a marijuana cigarette two weeks prior to the accident. The presence of a trace amount of marijuana (2 nanograms of marijuana and 5 nanograms of marijuana metabolite) in her system triggers a criminal prosecution and a lengthy prison sentence in Nevada. Under the newly enacted "prohibited substance" theory, Mary Jane is held to have committed a felony DUI, a non-probationable offense of two (2) to twenty (20) years in the Nevada State Prison for each decedent. In both cases, the tire was the sole cause of the accident, the trace amount of marijuana did not cause the tire to blow-out. The necessary causal link is absent.

In *Ashcroft, Attorney General, et al. v. Free Speech Coalition, et al.*, United States Supreme Court Slip Opn. No. 00-795 (Argued October 30, 2001 – Decided April 16, 2002), this Court held certain parts of the Child Pornography Prevention Act (CPPA) to be unconstitutional "because it lacks the **required link** between its prohibitions and the affront to community standards prohibited by the definition of obscenity." (*Ashcroft* at p. 11) (Emphasis added.) The Court continued, "Without a significantly stronger, more direct connection, the Government may not prohibit speech on the ground that it may encourage

pedophiles to engage in illegal conduct." (*Ashcroft* at p. 15-16) The Court again said, "While the government asserts that the images can lead to actual instances of child abuse, see infra, at 13-16, the causal link is contingent and indirect." (*Id.* at p.12) Clearly, legislation to be constitutional must have a causal relationship between what is prohibited and what occurred.

The Nevada Supreme Court condemned prosecuting unimpaired drug using drivers for DUI in *Cotter v. State*, 103 Nev. 303, 738 P.2d 506 (1987) ("It would make felons of drivers . . . irrespective of whether the medication had any causal relationship to the event leading to the injury of another.") *Id.* at 306. Yet, a person who does not have a prescription for the controlled substance is still prosecuted under the impairment theory.[34] NRS 484.3795(1)(f) as interpreted by the Nevada Supreme Court allows a conviction and punishment for being under the influence when the person was not under the influence. Petitioner was found **not** guilty of being under the influence. The Jury had specifically found that drugs did not **cause** the accident. Petitioner is now in prison because of a trace chemical result, not because of impairment. Since NRS 484.3795(1)(f) is a criminal DUI theory, there must be a causal nexus between the drug ingested and the accident.

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[34] In Nevada, all "prohibited substances" are controlled substances but not all controlled substances are "prohibited substances." Marijuana is much less harmful than many of Nevada's controlled substances and alcohol.

NRS 484.3795 lacks a causal nexus. Therefore this newly enacted "prohibited substance" theory is unconstitutional.

Respectfully submitted,

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IN THE SUPREME COURT OF THE
STATE OF NEVADA

JESSICA WILLIAMS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent,

Appeal from a judgment of conviction, pursuant to a jury verdict, of six counts of driving with a prohibited substance in the blood or urine, one count of use of a controlled substance, and one count of possession of a controlled substance. Eighth Judicial District Court, Clark County; Mark W. Gibbons, Judge.

*Affirmed.*

Law office of John G. Watkins, Las Vegas; Law Office of Ellen J. Bezian, Las Vegas, for Appellant.

Frankie Sue Del Papa, Attorney General, Carson City; Stewart L. Bell, District Attorney, and Bruce W. Nelson, Deputy District Attorney, Clark County, for Respondent.

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BEFORE THE COURT EN BANC.

OPINION

(Filed Aug. 2, 2002)

By the Court, LEAVITT, J.:

In this appeal, appellant Jessica Williams raises several claims of error relating to her conviction and

challenges the constitutionality of NRS 484.379(3) on various grounds.

## FACTS

On March 19, 2000, while returning to Las Vegas from the Valley of Fire via Interstate 15, Williams drove her van off the road, into the median, and then struck and killed six teenagers. Testimony at trial revealed that Williams had stayed up all night on March 18, 2000. Williams admitted to using marijuana approximately two hours prior to the collision. Williams also admitted to using a designer drug, "ecstacy," on the evening prior to the collision. After the collision, Williams admitted to being the driver of the van. She also voluntarily turned over her marijuana pipe to police. Residue in the pipe was subsequently analyzed and found to be marijuana. Williams was also found to be in the possession of a plastic bag containing a substance that subsequent tests confirmed was marijuana. Williams gave three blood samples for testing purposes, which were subsequently analyzed and found to contain in excess of the proscribed levels of the active ingredient in marijuana and its metabolite.

Williams claimed that she fell asleep at the wheel. Several witnesses testified at trial that they saw Williams' vehicle pass them and then drift to the right. The passenger in Williams' van testified that she awoke when the van drifted into the median, then looked over and saw Williams asleep.

Williams was charged, in part, with six counts of driving while intoxicated and/or driving with a prohibited substance in her bloodstream, six counts of reckless driving, six counts of involuntary manslaughter, one count

of possession of a controlled substance, and one count of using a controlled substance. After extensive pretrial motions, including challenges to the constitutionality of the prohibited substance statute, to the form of the indictment, and to Williams' attempts to raise the issue of the county's purported negligence, Williams proceeded to trial. At the conclusion of a two-week trial, the jury was instructed that it could find Williams guilty of either the DUI, the reckless driving, or the involuntary manslaughter charges. As to the DUI charges, the verdict form contained two options for each count – one for driving under the influence and one for driving with a prohibited substance in the bloodstream. The jury was instructed that it could find Williams guilty under either or both DUI theories but that it could not find her guilty of "involuntary manslaughter and reckless [driving] and one or both of the [DUI's]."

Williams was convicted by a jury of six counts of driving with a prohibited substance in the blood or urine, one count of use of a controlled substance, and one count of possession of a controlled substance. The jury returned not guilty verdicts on the six counts of driving while under the influence, six counts of involuntary manslaughter, six counts of reckless driving, and on the single count of being under the influence of a controlled substance. Williams' subsequent motion for a new trial was denied. The judgment of conviction was entered on April 5, 2001, and Williams timely filed this appeal.

## DISCUSSION

Williams challenges the constitutionality of NRS 484.379(3) on various grounds. In addition, Williams

claims that under the Double Jeopardy Clause, her acquittal of the charges pursuant to NRS 484.3795(1)(d) (driving under the influence of a controlled substance) precluded her conviction of the charges pursuant to NRS 484.3795(1)(f) (driving with a prohibited substance in the blood). Williams also claims: that the district court erred in prohibiting her from raising Clark County's purported negligence as the proximate cause of the deaths; that the failure to refrigerate her blood samples constituted destruction of evidence and violated her right to due process; and that the district court erred in refusing to conduct a suppression hearing on her motion to exclude the blood evidence until after the close of trial. We have considered these, and Williams' other claims of error, and conclude that they lack merit.

A. Constitutionality of NRS 484.379(3)

In 1999, the Nevada Legislature enacted NRS 484.379(3), which provides, in pertinent part, that "[i]t is unlawful for any person to drive or be in actual physical control of a vehicle on a highway . . . with an amount of prohibited substance in his blood . . . that is equal to or greater than" two nanograms per milliliter of marijuana or five nanograms per milliliter of marijuana metabolite.[1] The Legislature also added subsection (f) to NRS 484.3795(1).[2] Under that section, a person is guilty of a felony if the person "[h]as a prohibited substance in his blood or urine in an amount that is equal to or greater than the

[1] 1999 Nev. Stat., ch.622, §23, at 3415-16.

[2] *Id.* §28, at 3422.

amount set forth in subsection 3 of NRS 484.379" and the person neglects a duty imposed by law while driving that proximately causes the death of or substantial bodily harm to another person.

At a pretrial hearing to consider the constitutionality of the prohibited substance statute, Senator Jon Porter, who initially proposed the legislation, testified that the Legislature intended to create a per se statute similar to the alcohol per se statute. During this hearing, Senator Porter noted that there were twelve different hearings on the bill and that the wording changed during the course of these hearings. The original draft of the bill provided that driving or being in control of a vehicle with "a detectable amount of a controlled substance" constituted a DUI violation.[3] The bill was subsequently amended to include a short list of controlled substances, which were deemed to be prohibited substances, and if found in a driver's system, would constitute a per se DUI violation.[4] In response to concerns over the absence of a defined level of drugs required for a conviction, the bill was amended, where possible, to include the federal standards set by the Substance Abuse and Mental Health Services Administration ("SAMHSA").[5] SAMHSA is the agency responsible for setting standards for toxicology testing of airline pilots,

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[3] S.B. 481, 70th Leg. (Nev.1999) (referred to Senate Comm. on Judiciary on March 18, 1999).

[4] Hearing on S.B. 481 Before the Senate Comm. on Judiciary, 70th Leg., 6 (Nev., April 9, 1999).

[5] Hearing on S.B. 481 Before the Assembly Comm. on Judiciary, 70th Leg., 12-15 (Nev., May 5, 1999).

train engineers, and others who must be tested for drugs under federal law.

Williams challenges the constitutionality of the resulting prohibited substance statute, NRS 484.379(3), on several bases, each of which will be separately addressed.

1. Equal protection

Williams first contends that NRS 484.379(3) violates the Equal Protection Clause because it impermissibly treats drivers with proscribed levels of drugs in their systems differently from others.[6] In analyzing equal protection challenges, the appropriate level of judicial scrutiny must first be determined by considering the nature of the right being asserted.[7] Statutes which involve fundamental rights (such as privacy) or which are based on suspect classifications (such as race) are subject to strict scrutiny.[8] Statutes which do not infringe upon fundamental rights nor involve a suspect classification are reviewed using the lowest level of scrutiny – rational basis.[9] Under the rational basis standard, legislation will be upheld so long as it is rationally related to a legitimate governmental interest.[10]

In a footnote in Williams' opening brief, she argues that this court should apply a strict scrutiny standard

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[6] U.S. Const. amend. XIV, §1; Nev. Const. art. 4, §21.

[7] *See Gaines v. State,* 116 Nev. 359, 371, 998 P.2d 166, 173 (2000).

[8] *Id.*

[9] *Id.*

[10] *Id.*

because the "right" to drive is a fundamental right. In the context of a license revocation proceeding, we have previously held that there is no constitutional right to drive; rather, driving is a privilege.[11] Other courts have similarly held that neither driving nor using illicit drugs constitute fundamental rights.[12] The appropriate level of scrutiny is thus the rational basis standard. During oral argument, Williams' counsel conceded that rational basis is the appropriate standard of review.

All statutes are presumed constitutional and the party attacking the statute has the burden of establishing that the statute is invalid.[13] The United States Supreme Court has provided the following guidelines in determining the rational basis of a statute:

> [A] legislature that creates these categories need not "actually articulate at any time the purpose or rationale supporting its classification." Instead, a classification "must be upheld against equal protection challenge *if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.*"
>
> A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. "[A] legislative choice is not subject to courtroom factfinding and may be

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[11] *Zamarripa v. District Court*, 103 Nev. 638, 642, 747 P.2d 1386, 1388 (1987).

[12] *State v. Phillips*, 873 P.2d 706, 709 & n.5 (Ariz. Ct. App. 1994); *see also Shepler v. State*, 758 N.E.2d 966, 969 (Ind. Ct. App. 2001); *People v. Gassman*, 622 N.E. 2d 845, 853 (Ill. App. Ct. 1993).

[13] *Sheriff v. Martin*, 99 Nev. 336, 340, 662 P.2d 634, 637 (1983).

> based on rational speculation unsupported by evidence or empirical data." . . . Finally, courts are compelled . . . to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it "'is not made with mathematical nicety or because in practice it results in some inequality.'" "The problems of government are practical ones and may justify rough accommodations – [however] illogical . . . and unscientific [the accommodations may be]."[14]

The State contends that the prohibited substance statute is rationally related to the State's interest in highway safety and in deterring illicit drug use. We agree.

In passing the prohibited substance statute, the Legislature clearly articulated its intent to follow the lead of nine other states and create a per se drug violation[15]

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[14] *Heller v. Doe*, 509 U.S. 312, 320-21 (1993) (citations omitted) (emphasis added).

[15] In considering this legislation, the Legislature received information that nine other states had already enacted per se drug statutes. These states included Arizona, Georgia, Illinois, Indiana, Iowa, Minnesota, Rhode Island, South Dakota, and Utah. At the time, statutes in Arizona, Georgia, and Illinois had been challenged and found to be a proper exercise of legislative authority. Since then, Indiana and Iowa have also upheld their per se drug statutes. *Shepler*, 758 N.E.2d at 969; *Loder v. Iowa Dept. of Transp.*, 622 N.W.2d 513, 516 (Iowa Ct. App. 2000). Based on another statute providing for medical use of marijuana, Georgia concluded that as to marijuana, the per se drug statute violated the Equal Protection Clause because it treated legal and illegal marijuana users differently without a rational basis. *Love v. State*, 517 S.E.2d 53, 57 (Ga.1999). However, Georgia has subsequently recognized the validity of the statute as applied to drivers with cocaine in their system. *See Carthon v. State*, 548 S.E.2d 649, 654

(Continued on following page)

similar to the alcohol per se statute. The Legislature considered extensive testimony before passing the law and rejected the concerns expressed by those opposed to the law, who argued it lacked a direct correlation between the prohibited drugs in a driver's system and impairment. Since the law was passed in 1999, the Legislature in 2001 had an opportunity to amend the statute and did not do so, although other aspects of the DUI statute were amended during the 2001 legislative session.

We have previously recognized traffic safety as a rational basis for upholding statutes that regulate the use of substances that may impair a person's ability to drive.[16] In considering Arizona's per se drug statute, the Arizona Court of Appeals concluded in *State v. Phillips* that banning driving by persons with any measurable amount of illicit drugs was constitutional because "the legislature was reasonable in determining that there is no level of illicit drug use which can be acceptably combined with driving a vehicle; the established potential for lethal consequences is too great."[17] Likewise, we conclude that the governmental interest in maintaining safe highways is sufficient for our prohibited substance statute to survive a constitutional attack on the basis that it impermissibly treats drivers with the proscribed levels of illicit drugs in their system differently from others.

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(Ga. Ct. App. 2001); *Keenum v. State*, 546 S.E.2d 288, 289 (Ga. Ct. App. 2001).

[16] *Sereika v. State*, 114 Nev. 142, 149, 955 P.2d 175, 180 (1998).

[17] 873 P.2d at 710.

To the extent that Williams' argument is premised on the distinction made between legal and illegal users of marijuana, we likewise conclude that it lacks merit. This portion of Williams' argument is based on language in NRS 484.1245 that exempts substances used by persons with a valid prescription for that substance from the definition of "prohibited substances" as used in NRS 484.379(3). Williams also points to the exclusion of certain parts of the marijuana plant from the definition of "marijuana" in NRS 453.096 in asserting there could be "legal" users, as well as the fact that doctors in Nevada may prescribe Marinol[18] to certain persons.

The State contends that Nevada did not recognize any lawful users of marijuana at the time of Williams' collision or conviction.[19] In addition, the State contends that even if such a distinction existed, it would be rationally related to a legitimate state objective in deterring illicit drug use. We agree.

The Legislature could have reasonably determined that illegal use of a substance poses a greater threat to the public – and therefore warrants a harsher punishment – because unlike prescribed use, illegal use of drugs is not controlled. Specifically, a prescription is generally for a drug which has been reviewed and/or approved by the Food and Drug Administration ("FDA"), is of a specific

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[18] Marinol is a drug containing one of the active ingredients in marijuana.

[19] Though Nevada voters in the 2000 election approved a referendum authorizing the Legislature to draft a medicinal marijuana statute, the referendum was passed after Williams' collision and such a statute has not yet been enacted.

potency, is prescribed at a certain dosage, and is often accompanied by warnings not to drive. Conversely, people who use illicit drugs do so to impair themselves – to obtain a specific effect or desired "high," which arguably makes them more likely to be unable to drive safely. Under *Heller v. Doe*,[20] this or any other reasonably conceivable rationale need not have been actually considered by our Legislature to provide a basis for upholding a statute reviewed under the rational basis test.

We conclude that NRS 484.379(3) is rationally related to a legitimate state objective and is therefore constitutional. In doing so, we reiterate that it is the province of the Legislature to pass legislation, while our duty is to determine whether such legislation passes constitutional scrutiny and is therefore valid law.[21] Opponents of a valid statute must look to the Legislature rather than the judiciary to amend the law.

2. Due process

Williams next argues that the statute violates her right to substantive due process.[22] In this claim, Williams seems to mimic her equal protection arguments. Williams claims that the State may not deprive her of her right to drive while having "low" levels of marijuana because there is no rational, non-arbitrary connection to a legitimate purpose. In addition, Williams claims that the means utilized by the Legislature to achieve its legitimate purpose are too

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[20] 509 U.S. at 319-21.

[21] *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

[22] U.S. Const. amend. XIV, §1.

onerous because there is no legitimate interest in prosecuting unimpaired drivers for DUI. We conclude this argument lacks merit.

As previously discussed, there are several ways in which the statute could be rationally related to legitimate governmental objectives. One plausible rationale suffices even if not considered or articulated by the Legislature.[23] Further, when the constitutionality of a statute is examined using the rational basis standard, the state is not compelled to use the least restrictive means to reach the desired objective.[24] A statute analyzed under this standard must survive a constitutional challenge "even when there is an imperfect fit between means and ends."[25]

3. Vagueness

Williams claims that the prohibited substance statute is void for vagueness because she cannot tell what part of the marijuana plant or which marijuana metabolites are prohibited or when she has reached the levels proscribed by NRS 484.379(3).

A statute is void for vagueness if it fails to give a person of ordinary intelligence fair notice that her conduct is forbidden by statute.[26] While a facial attack may be asserted as to a statute that implicates constitutionally protected conduct, a statute that does not implicate

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[23] *Heller*, 509 U.S. at 319-21.

[24] *Id.* at 320-21.

[25] *Id.* at 321.

[26] *United States v. Harriss*, 347 U.S. 612, 617 (1954).

constitutionally protected conduct, as in this instance, may be void for vagueness only if it is vague in all of its applications.[27] The Due Process Clause "'does not require impossible standards of specificity in penal statutes.'"[28] Instead, a statute will be deemed to have given sufficient warning as to proscribed conduct when the words utilized have a well settled and ordinarily understood meaning when viewed in the context of the entire statute.[29] Statutes are presumptively valid and the burden is on those attacking them to show their unconstitutionality.[30] Williams thus has the burden of proving that the statute failed to provide adequate notice of the proscribed conduct.

In *Phillips*, the Arizona Court of Appeals considered the argument that Arizona's per se drug statute was unconstitutionally vague.[31] The court rejected the claim and held that the statute provided adequate warning of the proscribed conduct because none of the terms utilized in the statute defied common understanding, and interpretation of the statute was not dependant on a third party's judgment.[32] *Phillips* held that a potential offender was therefore on notice that any driver who has ingested a prohibited drug would be subject to prosecution.[33] In

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[27] *Martin*, 99 Nev. at 340, 662 P.2d at 637.

[28] *Sheriff v. Vlasak*, 111 Nev. 59, 61, 888 P.2d 441, 443 (1995) (quoting *Wilmeth v. State*, 96 Nev. 403, 405, 610 P.2d 735, 737 (1980) (citations omitted)).

[29] *Id.*

[30] *Id.* at 61-62, 888 P.2d at 443.

[31] 873 P.2d at 708-09.

[32] *Id.* at 709.

[33] *Id.*

*People v. Gassman*,[34] the Illinois Court of Appeals rejected a vagueness challenge to the Illinois per se drug statute for similar reasons. Like the Arizona statute, the Illinois statute prohibits driving with any detectable amount of drugs in the system.[35]

Nevada's prohibited substance statute is even more explicit than the Arizona or Illinois statutes because only ten substances or metabolites are prohibited and the proscribed amount is indicated for both blood and urine levels. In addition, because the statute contains the specific amount of drug that is prohibited, there is even less need to depend on a third party's judgment.

The substance at issue in the present case is marijuana and its metabolite. Although marijuana is not defined in NRS Chapter 484, it is defined in NRS 453.096. A metabolite, as defined in an ordinary dictionary, means a "product of metabolism."[36] Considering the plain meaning of the terms, we conclude that a person of ordinary intelligence has adequate notice of the meaning of marijuana, and that marijuana metabolites are those metabolites that result from ingesting marijuana – as defined in NRS 453.096. We note that Williams appears to have clearly understood the common meaning of the term "marijuana." Williams acknowledged being a regular marijuana user and turned over her pipe containing marijuana residue to a police officer at the collision site.

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[34] *Gassman*, 622 N.E.2d at 853.

[35] *See* 625 Ill. Comp. Stat. Ann. 5/11-501(a)(6) (West Supp. 2002).

[36] *See Random House Webster's College Dictionary* 823 (2d ed. 1996).

She was also found to be in possession of a plastic bag later found to contain marijuana.

Williams' second vagueness claim is that a person cannot tell when he or she will reach the prohibited levels of marijuana. In *Slinkard v. State*, we considered and rejected this same argument with regard to the alcohol per se statute.[37] We determined that a person of average intelligence could reason that consumption of a substantial quantity of alcohol could result in the proscribed level and held that this sufficed to satisfy the notice requirement.[38] In the context of this case, the argument is even weaker because unlike alcohol – which may be legally possessed and consumed – it is unlawful to use or possess marijuana in any amount.[39] Williams was given adequate notice that she was not permitted to legally possess or use marijuana, yet she chose to do both and then drive a vehicle. Further, the statute provides adequate notice that it is unlawful to drive with clearly defined levels of marijuana metabolite in the bloodstream.

4. Overbreadth

Williams' last constitutional challenge is that NRS 484.379(3) fails to recognize the lawful use of the parts of the marijuana plant that are excluded from the definition of marijuana under NRS 453.096(2). Williams argues that this impermissibly punishes the use of all marijuana and

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[37] 106 Nev. 393, 395, 793 P.2d 1330, 1331 (1990).

[38] *Id.*

[39] NRS 453.336 (possession of a controlled substance); NRS 453.411 (being under the influence of a controlled substance).

that since it captures legal conduct, the statute is overbroad. She also argues that marijuana is not precisely defined in NRS 484.3795.

"[T]he overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights."[40] An overbreadth challenge may only be made if a statute infringes upon constitutionally protected conduct.[41] Absent such infringement, an overbreadth challenge must fail.[42]

We have already determined that the statute being challenged by Williams does not affect constitutionally protected conduct. Therefore, Williams' overbreadth argument is without merit.

B. Double jeopardy

Next, Williams argues that her conviction under the prohibited substance theory violates the Double Jeopardy Clause.[43] Specifically, she claims that since she was charged under two subsections of NRS 484.3795(1), and the district court treated the alternative theories as separate offenses by asking the jury to return verdicts as to each theory, that acquittal under the first theory precluded conviction under the second theory.

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[40] *Chicago v. Morales*, 527 U.S. 41, 52 (1999)(plurality opinion).

[41] *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 494 (1982).

[42] *Id.*

[43] U.S. Const. amend. V.

"'[T]he Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense.'"[44]

To determine whether a single act which allegedly violates two statutory provisions constitutes a single offense for purposes of double jeopardy analysis, we recently reiterated that the test set forth in *Blockburger v. United States*[45] is the appropriate tool.[46] Under this test, "if the elements of one offense are entirely included within the elements of a second offense, the first offense is a lesser included offense and the Double Jeopardy Clause prohibits a conviction for both offenses."[47] Here, NRS 484.3795(1)(d) makes it unlawful to drive or be in actual physical control of a vehicle while "under the influence of a controlled substance." NRS 484.3795(1)(f) prohibits a person from driving or being in actual physical control of a vehicle while having a prohibited substance in his or her blood in excess of the amount set forth in NRS 484.379(3). Impairment is not necessary for a conviction under NRS 484.3795(1)(f); and, unlike NRS 484.3795(1)(f), no specific level of a prohibited substance must be found in order to convict a person under NRS 484.3795(1)(d). In addition,

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[44] *Gordon v. District Court*, 112 Nev. 216, 220, 913 P.2d 240, 243 (1996) (quoting *United States v. Halper*, 490 U.S. 435, 440 (1989), *abrogated on other grounds by Hudson v. united States*, 522 U.S. 93 (1997)).

[45] 284 U.S. 299 (1932).

[46] *Barton v .State*, 117 Nev. ____,____, 30 P.3d 1103, 1107 (2001).

[47] *Id.*

we previously recognized the existence of a per se violation, in the alcohol context, and stated that "[t]his violation exists completely apart from a violation based on being under the influence of intoxicating liquor or a controlled substance."[48] Under the *Blockburger* test, each of these subsections defines a separate offense for purposes of double jeopardy analysis.

We previously concluded that multiple convictions under separate DUI theories are impermissibly redundant.[49] In *Dossey v. State,*[50] the driver was charged and convicted of three counts of driving while intoxicated, each brought under a different subsection of NRS 484.379(1). We concluded "that the [L]egislature intended the subsections of [the DUI] statute to define alternative means of committing a single offense, not separable offenses permitting a conviction of multiple counts based on a single

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[48] *Long v. State*, 109 Nev. 523, 530 853 P.2d 112, 116 (1993); *see also State v. Dow*, 806 P.2d 402, 405-07 (Haw. 1991) (holding that Hawaii's DUI statute "provides two alternative means of proving a single offense" and that trying a defendant on a per se DUI theory, after she had been "acquitted" of the impairment theory, did not constitute double jeopardy because "acquittal" on one theory was not fatal to completely separate theory); *State v. Abbott,* 514 P.2d 355 (Or. Ct. App. 1973) (holding that there was no prohibition against convicting a defendant of a per se violation while simultaneously acquitting a defendant of driving under the influence.); *State v. Superior Court of Pima County*, 721 P.2d 676 (Ariz. Ct. App. 1986) (explaining that per se violation and driving under the influence involve different factual elements).

[49] *Dossey v. State,*114 Nev. 904, 964 P.2d 782 (1998); *see also Albitre v. State*, 103 Nev. 281, 283, 738 P.2d 1307, 1309 (1987) (holding that "redundant convictions that do not comport with legislative intent" should be stricken).

[50] 114 Nev. at 904, 964 P.2d at 782.

act."[51] Accordingly, using the redundant conviction analysis, we vacated the conviction on two of the counts as redundant but affirmed the conviction and sentence as to the third count.

Under NRS 173.075(2), alternative means of committing a crime may be alleged within a single count. We previously have held that although a charging document may set forth alternative means of committing an offense within a single count, alternative offenses must be charged in separate counts.[52] Further, setting forth alternative and distinct theories of prosecution in one count does not fail to give the defendant adequate notice of the charges against him.[53] Based on our decision in *Dossey*, the State properly alleged alternative theories in one count. The purpose of NRS 173.075 is clearly to ensure that the defendant is given proper notice of the charges he is faced with so as to adequately defend against them. The record here indicates that Williams was clearly on notice as to the charges she faced.

We conclude that NRS 484.3795(1)(d) and (f) constitute alternative means of committing an offense and that appellant's acquittal under the one subsection and her conviction under the other does not violate the Double Jeopardy Clause. Further, we conclude that Williams' argument also lacks merit because she has been subjected

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[51] *Id.* at 909, 964 P.2d at 785.

[52] *Jenkins v. District Court*, 109 Nev. 337, 339-40, 849 P.2d 1055, 1057 (1993).

[53] *Sheriff v. Aesoph*, 100 Nev. 477, 478, 686 P.2d 237, 238 (1984).

to only one prosecution and one punishment for each DUI charge.

C. Proximate cause

Williams claims that the trial court erred in excluding evidence of the county's purported negligence because that decision improperly shifted the burden of proof to the defense on the issue of proximate cause. We disagree.

The State's motion in limine to exclude this evidence was granted on the basis that any purported negligence by a third party would not exculpate Williams if she was found to be a proximate cause of the deaths. Proximate cause was defined in Jury Instruction No. 15, which stated:

> "Proximate Cause" is that cause which is natural and a continuous sequence, unbroken by any other intervening causes, that produces the injury and without which the injury would not have occurred.
>
> A proximate cause of an injury can be said to be that which necessarily set in operation the factors that accomplish the injury.
>
> The contributory negligence of another does not exonerate the defendant unless the other's negligence was the sole cause of injury.

We have previously held that a similar instruction "was an accurate statement of Nevada Law" because an intervening cause must be a "superseding cause" or the

"sole cause" in order to completely excuse the prior act.[54] We conclude that the instruction given in this case was also proper.

Further, we conclude that the district court did not abuse its discretion by excluding the evidence as irrelevant.[55] Our point is illustrated by a California case involving similar facts. In *People v. Autry*,[56] the California Court of Appeals considered the question of whether alleged negligence by a construction company in placing work crews in the median without the required attenuator truck behind the workers to absorb any collisions and prevent injuries to the workers relieved a defendant of criminal liability. There, as in this case, the defendant was charged with driving under the influence and second-degree murder based on the deaths that resulted from the collision with the workers.[57] The court found as a matter of law that the construction company's alleged negligence was a preexisting condition and therefore could not be an intervening or superseding cause.[58] The court reasoned the "[i]n the normal meaning of the words, . . . an 'intervening' or 'superseding' cause which relieves the criminal actor of

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[54] *Etcheverry v. State*, 107 Nev. 782, 785, 821 P.2d 350, 351 (1991).

[55] NRS 48.025 provides that only relevant evidence is admissible. The determination of whether evidence is relevant lies within the sound discretion of the trial judge. *Atkins v. State*, 112 Nev. 1122, 1127, 923 P.2d 1119, 1123 (1996). That decision will not be disturbed on appeal "absent a clear abuse of that discretion." *Id.*

[56] 43 Cal. Rptr. 2d 135, 137 (Ct. App. 1995).

[57] *Id.* at 136.

[58] *Id.* at 140.

responsibility is one which 'breaks the chain of causation' *after* the defendant's *original* act."[59]

Likewise, in the present case, the county's placement of the teenagers in the median was a preexisting condition to Williams' act of veering off the road and colliding with the teenagers in the median. The district court thus properly held that any purported negligence would not exonerate Williams and properly rejected the evidence as irrelevant.

We conclude that the district court properly exercised its discretion in concluding that evidence of the county's purported negligence was irrelevant because such negligence could not exculpate Williams. This decision did not shift the burden of proof because the State was still required to prove beyond a reasonable doubt that Williams was the proximate cause of the resulting deaths.

D. Destruction of evidence

Williams next contends that her conviction should be vacated because the State failed to preserve her blood sample. Williams raised this argument in a motion to suppress the blood evidence and also claims that the district court committed plain error in refusing to conduct a suppression hearing until the close of trial.

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[59] *Id.*

1. Suppression of evidence

In *Arizona v. Youngblood*,[60] the United States Supreme Court held that the state's failure to preserve evidence does not warrant dismissal unless the defendant can show bad faith by the government and prejudice from the loss of the loss of the evidence.[61] We have reached a similar conclusion:

> [T]he State's loss or destruction of evidence constitutes a due process violation only if the defendant shows either that the State acted in bad faith or that the defendant suffered undue prejudice and the exculpatory value of the evidence was apparent before it was lost or destroyed. Where there is no bad faith, the defendant has the burden of showing prejudice. The defendant must show that "'it could be reasonably anticipated that the evidence sought would be exculpatory and material to [the] defense.'" It is not sufficient to show "'merely a hoped-for conclusion'" or "'that examination of the evidence would be helpful in preparing [a] defense.'"[62]

Additionally, in *State v. Hall*, we held that a lab's routine destruction of a DUI defendant's blood sample, after a year, did not constitute bad faith.[63]

Here, the blood evidence was not lost or destroyed by the State. Instead, without the State's knowledge, the

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[60] 488 U.S. 51 (1988).

[61] *Id.* at 57-58.

[62] *Leonard v. State*, 117 Nev. 53, 68, 17 P.3d 397, 407 (2001) (citations omitted).

[63] 105 Nev. 7, 9, 768 P.2d 349, 350 (1989).

blood sample was stored by an independent lab (APL) in an unrefrigerated location – according to the lab's normal procedures. Williams did not request a retest of her blood sample for over ten months after it was drawn. Upon request, the State stipulated to allow the retest and there is no evidence that the State delayed the request in any way.

The district court concluded that Williams had failed to show that the State acted in bad faith or that the exculpatory value of the blood samples was apparent or material to her defense at the time that it was stored at room temperature. Nevada case law, as clearly articulated in *Leonard v. State*,[64] supports this conclusion. Williams has failed to demonstrate how this decision was erroneous.

Accordingly, we conclude that the district court properly determined that Williams failed to show the non-refrigeration constituted a due process violation. We also concur with the district court's decision to allow the jury to consider all of the evidence relating to the original test, the retest, the delay in retesting, and the lack of refrigeration. The jury was free to weigh the evidence as it deemed appropriate.

2. Delay in suppression hearing

Williams claims that the trial court's refusal to conduct an evidentiary hearing on her motion to suppress the blood evidence until after the close of trial was plain error.

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[64] 117 Nev. 53, 17 P.3d 397.

The fact that Williams' blood samples had not been refrigerated did not become known until near the end of the presentation of evidence phase, when Williams sought to introduce the retest results and the testimony of an expert witness not previously disclosed to the State. The State had introduced the blood evidence and the lab analyst's testimony, without objection, six days before this information became known. When this new information arose, the district court recognized that this information was new to all parties and considered the motion to suppress but denied it, without prejudice, on the basis that given the stage of the proceedings, it was not timely.

The district court allowed counsel on both sides to examine the expert offered by Williams outside the presence of the jury. After hearing the testimony, the district court ruled that it would allow both sides ample time to examine the witness in the presence of the jury and would allow both sides to elicit testimony as to how the blood evidence would have been affected by the delay in retesting and by having been stored at room temperature. The district court also advised the parties that if the motion to suppress was renewed post-trial, an evidentiary hearing would then be conducted.

NRS 174.125(1) provides that motions to suppress evidence must be made before trial, unless the moving party was unaware of the grounds for the motion before trial. NRS 174.125(3)(a) requires that motions to suppress "must be made in writing not less than 15 days before the date set for trial" except in certain circumstances not present in this case. NRS 174.125(3)(b) allows the district court to permit the motion to be filed at a later date "if a defendant waives hearing on the motion or for other good cause shown."

Here, Williams was unaware of the grounds for filing the motion before the trial. The district court could have thus considered the motion during trial under NRS 174.125(3)(b). However, the terms in the statute are discretionary and the decision to consider the motion was therefore within the discretion of the district court. The district court considered the motion but refused to stop the proceedings in order to immediately conduct an evidentiary hearing. We conclude that this decision was within the district court's discretion.

E. Other claims of error

Williams further claims that the district court erred in admitting the testimony of the lab analyst who handled the blood sample, though Williams did not object or cross-examine the witness. In addition, Williams contends that the district court erred by prohibiting her attorney from talking about an unrelated case, in refusing a proffered jury instruction, and in admitting photographs of the victims taken at the scene of the collision. These arguments were fully briefed. We have considered them and conclude that they too lack merit.

Accordingly, we order the judgement of conviction affirmed.

/s/ _____, J.
Leavitt

We Concur:

/s/ _____, C J.
Maupin

/s/ _____, J.
Young

/s/ _____, J.
Shearing

/s/ _____, J.
Agosti

/s/ _____, J.
Rose

/s/ _____, J.
Becker

**JOC**
STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477
200 S. Third Street
Las Vegas, Nevada 89155
(702) 455-4711
Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

| | | |
|---|---|---|
| THE STATE OF NEVADA,<br>Plaintiff,<br>-vs-<br>JESSICA WILLIAMS,<br>#01534178<br>Defendant. | ) | Case No. C166483<br>Dept. No. VII |

JUDGMENT OF CONVICTION (JURY TRIAL)
(Filed Apr. 6, 2001)

The Defendant previously entered plea(s) of not guilty to the crime(s) of DRIVING AND/OR BEING IN ACTUAL PHYSICAL CONTROL WHILE UNDER THE INFLUENCE OF A CONTROLLED SUBSTANCE AND/OR WITH A PROHIBITED SUBSTANCE IN BLOOD OR URINE (Felony); RECKLESS DRIVING (Felony); INVOLUNTARY MANSLAUGHTER (Felony); POSSESSION OF CONTROLLED SUBSTANCE (Felony); and UNDER THE INFLUENCE OF CONTROLLED SUBSTANCE (Felony); in violation of NRS 484.3795, 484.377, 200.070, 453.336, 453.411, and the

matter having been tried before a jury and the Defendant being represented by counsel and having been found guilty of the crime(s) of COUNT I – DRIVING AND/OR BEING IN ACTUAL PHYSICAL CONTROL WITH A PROHIBITED SUBSTANCE IN BLOOD RESULTING IN THE DEATH OF SCOTT GARNER, JR. (FELONY); COUNT II – DRIVING AND/OR BEING IN ACTUAL PHYSICAL CONTROL WITH A PROHIBITED SUBSTANCE IN BLOOD RESULTING IN THE DEATH OF ALBERTO PUIG (FELONY); COUNT III – DRIVING AND/OR BEING IN ACTUAL PHYSICAL CONTROL WITH A PROHIBITED SUBSTANCE IN BLOOD RESULTING IN THE DEATH OF ANTHONY SMITH (FELONY); COUNT IV – DRIVING AND/OR BEING IN ACTUAL PHYSICAL CONTROL WITH A PROHIBITED SUBSTANCE IN BLOOD RESULTING IN THE DEATH OF REBECCAH GLICKEN (FELONY); COUNT V – DRIVING AND/OR BEING IN ACTUAL PHYSICAL CONTROL WITH A PROHIBITED SUBSTANCE IN BLOOD RESULTING IN THE DEATH OF MALINA STOLTZFUS (FELONY); COUNT VI – DRIVING AND/OR BEING IN ACTUAL PHYSICAL CONTROL WITH A PROHIBITED SUBSTANCE IN BLOOD RESULTING IN THE DEATH OF JENNIFER BOOTH (FELONY); COUNT XIX – USE OF A CONTROLLED SUBSTANCE (FELONY); and COUNT XX – POSSESSION OF CONTROLLED SUBSTANCE (FELONY); and thereafter on the 30th day of March, 2001, the Defendant was present in Court for sentencing with her counsel, JOHN G. WATKINS, ESQ.; and good cause appearing therefor,

THE DEFENDANT HEREBY ADJUDGED, guilty of the crime(s) as set forth in the jury's verdict and, in

addition to the $25 Administrative Assessment fee, a $60 Drug Analysis fee, a mandatory $12,000.00 FINE ($2,000.00 per DUI count), $48,300.00 RESTITUTION, and mandatory attendance of a victim impact panel, DEFENDANT WILLIAMS SENTENCED to the Nevada Department of Prisons as to: COUNT I – a MAXIMUM term of NINETY-SIX (96) MONTHS with a MINIMUM parole eligibility of THIRTY-SIX (36) MONTHS; COUNT II – a MAXIMUM term of NINETY-SIX (96 MONTHS with a MINIMUM parole eligibility of THIRTY-SIX (36) MONTHS; CONSECUTIVE to COUNT I; COUNT III – a MAXIMUM term of NINETY-SIX (96) MONTHS with a MINIMUM parole eligibility of THIRTY-SIX (36) MONTHS; CONSECUTIVE to COUNT II; COUNT IV – a MAXIMUM term of NINETY-SIX (96) MONTHS with a MINIMUM parole eligibility of THIRTY-SIX (36); CONSECUTIVE to COUNT III; COUNT V – a MAXIMUM term of NINETY-SIX (96) MONTHS with a MINIMUM parole eligibility of THIRTY-SIX (36) MONTHS; CONSECUTIVE to COUNT IV; COUNT VI – a MAXIMUM term of NINETY-SIX (96) MONTHS with a MINIMUM parole eligibility of THIRTY-SIX (36) MONTHS; CONSECUTIVE to COUNT V; COUNT XIX – a MAXIMUM term of THIRTY-FOUR (34) MONTHS with a MINIMUM parole eligibility of TWELVE (12) MONTHS; SUSPENDED; placed on PROBATION for an indeterminate period not to exceed TWO (2) YEARS (as to Count XIX ONLY), CONCURRENT with COUNT VI; COUNT XX – a MAXIMUM term of THIRTY-SIX (36) MONTHS with a MINIMUM parole eligibility of TWELVE (12) MONTHS; SUSPENDED; placed on PROBATION for an indeterminate period not to exceed TWO (2) YEARS (as to

Count XX ONLY), CONCURRENT with COUNT XIX. Defendant given credit for 376 days served.

DATED this 5 day of April, 2001

/s/ Mark Gibbons
DISTRICT JUDGE

**Nevada Revised Statutes**

**484.379. Driving under the influence of intoxicating liquor or controlled or prohibited substance: Unlawful acts; affirmative defense.**

1. It is unlawful for any person who:

(a) Is under the influence of intoxicating liquor;

(b) Has a concentration of alcohol of 0.10 or more in his blood or breath; or

(c) Is found by measurement within 2 hours after driving or being in actual physical control of a vehicle to have a concentration of alcohol of 0.10 or more in his blood or breath,

to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access.

2. It is unlawful for any person who:

(a) Is under the influence of a controlled substance;

(b) Is under the combined influence of intoxicating liquor and a controlled substance; or

(c) Inhales, ingests, applies or otherwise uses any chemical, poison or organic solvent, or any compound or combination of any of these, to a degree which renders him incapable of safely driving or exercising actual physical control of a vehicle,

to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access. The fact that any person charged with a violation of this subsection is or has been entitled to use that drug under

the laws of this state is not a defense against any charge of violating this subsection.

3. It is unlawful for any person to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access with an amount of a prohibited substance in his blood or urine that is equal to or greater than:

| Prohibited substance | Urine Nanograms per milliliter | Blood Nanograms per milliliter |
|---|---|---|
| (a) Amphetamine | 500 | 100 |
| (b) Cocaine | 150 | 50 |
| (c) Cocaine metabolite | 150 | 50 |
| (d) Heroin | 2,000 | 50 |
| (e) Heroin metabolite: | | |
| (1) Morphine | 2,000 | 50 |
| (2) 6-monoacetyl morphine | 10 | 10 |
| (f) Lysergic acid diethylamide | 25 | 10 |
| (g) Marihuana | 10 | 2 |
| (h) Marihuana metabolite | 15 | 5 |
| (i) Methamphetamine | 500 | 100 |
| (j) Phencyclidine | 25 | 10 |

4. If consumption is proven by a preponderance of the evidence, it is an affirmative defense under paragraph (c) of subsection 1 that the defendant consumed a sufficient quantity of alcohol after driving or being in actual physical control of the vehicle, and before his blood or breath was tested, to cause him to have a concentration of alcohol of 0.10 or more in his blood or breath. A defendant

who intends to offer this defense at a trial or preliminary hearing must, not less than 14 days before the trial or hearing or at such other time as the court may direct, file and serve on the prosecuting attorney a written notice of that intent.

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**484.3795. Driving under the influence of intoxicating liquor or controlled or prohibited substance: Penalty if death or substantial bodily harm results; segregation of offender; plea bargaining prohibited; affirmative defense; aggravating factor.**

1. A person who:

(a) Is under the influence of intoxicating liquor;

(b) Has a concentration of alcohol of 0.10 or more in his blood or breath;

(c) Is found by measurement within 2 hours after driving or being in actual physical control of a vehicle to have a concentration of alcohol of 0.10 or more in his blood or breath;

(d) Is under the influence of a controlled substance or is under the combined influence of intoxicating liquor and a controlled substance;

(e) Inhales, ingests, applies or otherwise uses any chemical, poison or organic solvent, or any compound or combination of any of these, to a degree which renders him incapable of safely driving or exercising actual physical control of a vehicle; or

(f) Has a prohibited substance in his blood or urine in an amount that is equal to or greater than the amount set forth in subsection 3 of NRS 484.379, and does any act or neglects any duty imposed by law while driving or in actual physical control of any vehicle on or off the highways of this state, if the act or neglect of duty proximately causes the death of, or substantial bodily harm to, a person other than himself, is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 20 years and must be further punished by a fine of not less than $2,000 nor more than $5,000. A person so imprisoned must, insofar as practicable, be segregated from offenders whose crimes were violent and, insofar as practicable, be assigned to an institution or facility of minimum security.

2. A prosecuting attorney shall not dismiss a charge of violating the provisions of subsection 1 in exchange for a plea of guilty, guilty but mentally ill or nolo contendere to a lesser charge or for any other reason unless he knows or it is obvious that the charge is not supported by probable cause or cannot be proved at the time of trial. A sentence imposed pursuant to subsection 1 may not be suspended nor may probation be granted.

3. If consumption is proven by a preponderance of the evidence, it is an affirmative defense under paragraph (c) of subsection 1 that the defendant consumed a sufficient quantity of alcohol after driving or being in actual physical control of the vehicle, and before his blood or breath was tested, to cause him to have a concentration of alcohol of 0.10 or more in his blood or breath. A defendant who intends to offer this defense at a trial or preliminary

hearing must, not less than 14 days before the trial or hearing or at such other time as the court may direct, file and serve on the prosecuting attorney a written notice of that intent.

4. If the defendant was transporting a person who is less than 15 years of age in the motor vehicle at the time of the violation, the court shall consider that fact as an aggravating factor in determining the sentence of the defendant.

**IND**
STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477
200 S. Third Street
Las Vegas, Nevada 89155
(702) 455-4711
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

| | |
|---|---|
| THE STATE OF NEVADA,<br>Plaintiff,<br>-vs-<br>JESSICA WILLIAMS,<br>#01534178<br>Defendant(s). | Case No. **C166483**<br>Dept. No. **VII**<br>SUPERCEDING INDICTMENT<br>(Filed May 10, 2000) |

STATE OF NEVADA )
)
COUNTY OF CLARK )

The Defendant(s) above named, JESSICA WILLIAMS, accused by the Clark County Grand Jury of the crimes of: **DRIVING AND/OR BEING IN ACTUAL PHYSICAL CONTROL WHILE UNDER THE INFLUENCE OF A CONTROLLED SUBSTANCE AND/OR WITH A PROHIBITED SUBSTANCE IN BLOOD OR URINE (Felony – NRS 484.3795); RECKLESS DRIVING (Felony – NRS 484.377); INVOLUNTARY MANSLAUGHTER (Felony – NRS 200.070); POSSESSION OF CONTROLLED SUBSTANCE (Felony – NRS 453.336); UNDER THE INFLUENCE OF CONTROLLED SUBSTANCE (Felony – NRS 453.411); and**

**POSSESSION OF DRUG PARAPHERNALIA (Misdemeanor – NRS 453.566)**, committed at and within the County of Clark, State of Nevada on or about the 19th day of March, 2000, as follows:

*COUNT I* – DRIVING AND/OR BEING IN ACTUAL PHYSICAL CONTROL WHILE UNDER THE INFLUENCE OF CONTROLLED SUBSTANCE AND/OR WITH A PROHIBITED SUBSTANCE IN BLOOD OR URINE

did then and there wilfully, unlawfully, and feloniously drive and/or be in actual physical control of a motor vehicle, to-wit: a 1992 Ford van, bearing Arizona License No. JFR453, on a highway, or on premises to which a public has access, to-wit: southbound on Interstate 15, south of the I-15 Speedway Interchange Ramp #4, Clark County, Nevada, with a prohibited substance(s), to-wit: Marijuana (Delta-9-Tetrahydrocannabinol), in her blood in an amount equal to or greater than 2 nanograms per milliliter and/or Marijuana metabolite (Delta-9-THC Carboxylic Acid) in her blood in an amount equal to or greater than 5 nanograms per milliliter and/or while Defendant was under the influence of a controlled substance, to-wit, Marijuana (Delta-9-Tetrahydrocannabinol and/or Methylenedioxymethamphetamine (Ecstasy) and/or Methylenedioxymethamphetamine, to a degree which rendered Defendant incapable of safely driving or exercising actual physical control of a vehicle, to-wit: by said Defendant failing to pay full time and attention to her driving, and/or by failing to drive in a careful and prudent manner and/or by failing to exercise due care and/or by failing to decrease speed when special hazards exist, to-wit: pedestrians working in the highway median wearing reflector vests and/or by failing to decrease speed when

special hazards exist, to-wit: pedestrians working near the highway or in the highway median near or adjacent to vehicles parked on the left and or right shoulders of the highway with vehicle emergency flashers illuminated, and/or by failing to maintain a travel lane and/or by failing to drive on the right half of the roadway, which acts, or neglect of duties, proximately caused the vehicle being driven by the Defendant to strike and collide with that certain pedestrian, SCOTT GARNER, JR., said collision proximately causing the death of the said SCOTT GARNER, JR.

* * *

*COUNT VII* – RECKLESS DRIVING

did then and there wilfully, unlawfully, and feloniously operate a motor vehicle, to-wit a 1992 Ford van, bearing Arizona License No. JFR453, southbound on Interstate 15, south of the I-15 Speedway Interchange Ramp #4, Clark County, Nevada, with wilful or wanton disregard for the safety of persons or property, in the following manner, to-wit: by said Defendant failing to pay full time and attention to her driving, and/or by failing to drive in a careful and/or prudent manner and/or by failing to exercise due care and/or by failing to decrease speed when special hazards exist, to-wit: pedestrians working in the highway median wearing reflector vests and/or by failing to decrease speed when special hazards exist, to-wit: pedestrians working near the highway or in the highway median near or adjacent to vehicles parked on the left and or right shoulders of the highway with vehicle emergency flashers illuminated, and/or by failing to maintain a travel lane and/or by failing to drive on the right half of the roadway, which acts, or neglect of duties,

proximately caused the vehicle being driven by the Defendant to strike and collide with certain pedestrian, SCOTT GARNER, JR., said collision proximately causing the death of the said SCOTT GARNER, JR.

* * *

*COUNT XIII* – INVOLUNTARY MANSLAUGHTER

did then and there unlawfully and feloniously kill SCOTT GARNER, JR., a human being, without any intent so to do, in the commission of a lawful act, to-wit: by driving that certain 1992 Ford van, bearing Arizona License No. JFR453, southbound on Interstate 15, south of the I-15 Speedway Interchange Ramp #4, Clark County, Nevada, in an unlawful and criminally negligent manner, to-wit: by said Defendant failing to pay full time and attention to her driving, and/or by failing to drive in a careful and/or prudent manner and/or by failing to exercise due care and/or by failing to decrease speed when special hazards, exist, to-wit: pedestrians working in the highway median wearing reflector vests and/or by failing to decrease speed when special hazards exist, to-wit: pedestrians working near the highway or in the highway median near or adjacent to vehicles parked on the left and or right shoulders of the highway with vehicle emergency flashers illuminated, and/or by failing to maintain a travel lane and/or by failing to drive on the right half of the roadway, which acts, or neglect of duties, proximately caused the vehicle being driven by the Defendant to strike and collide with that certain pedestrian, SCOTT GARNER, JR., said collision proximately causing the death of the said SCOTT GARNER, JR.

* * *

*COUNT XIX* – UNDER THE INFLUENCE OF A CONTROLLED SUBSTANCE

did then and there wilfully, unlawfully, feloniously, and knowingly use, or be under the influence of a controlled substance, to-wit: Marijuana (Delta-9-Tetrahydrocannabinol) and/or Methylenedioxymethamphetamine (Ecstasy) and/or Methylenedioxymethamphetamine.

*COUNT XX* – POSSESSION OF CONTROLLED SUBSTANCE

did then and there wilfully, unlawfully, feloniously, knowingly, and intentionally possess a controlled substance, to-wit: Marijuana.

*COUNT XXI* – POSSESSION OF DRUG PARAPHERNALIA

did then and there wilfully and unlawfully have in her possession or under her control, drug paraphernalia, to-wit: a pipe, said item commonly used for the purpose of smoking a controlled substance.

DATED this ___ day of May, 2000.

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

By /s/ Gary R. Booker
GARY R. BOOKER, Chief
Deputy District Attorney
Nevada Bar #002028

ENDORSEMENT: A True Bill

/s/ David R. Parks
Foreperson, Clark County Grand Jury

* * *

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

| | |
|---|---|
| THE STATE OF ARIZONA, | ) No. CR-12316 |
| Plaintiff, | ) MOTION TO SET ASIDE CONVICTION |
| vs. | ) |
| LARRY YOUNGBLOOD, | ) Hon. Howard Fell<br>) Division SR |
| Defendant. | ) |

COMES NOW the State of Arizona, by and through the Pima County Attorney, BARBARA LAWALL, and her Deputy, KATHLEEN MAYER, and hereby requests this Court to set aside the Defendant's conviction in the above entitled action. By virtue of this motion, the State is not conceding that the defendant was wrongfully arrested in this matter.

On the contrary, the State sought the prosecution and conviction of the defendant on these charges on the best evidence available at the time. A jury duly convicted Defendant of the charges.

Since then, however, the ability of the State to test physical evidence has been greatly enhanced by the advancement of DNA typing. Defendant requested to have the physical evidence which remained in his case tested via DNA analysis. The State agreed. As a result of said analysis, the defendant has been found not to be the donor of the physical evidence in the case and has thus been eliminated as the perpetrator of these crimes.

Hence, the State moves this court, pursuant to A.R.S. 13-907 to set aside the instant conviction. Further, the court may order a clearance of his record pertaining to this conviction, but only this conviction, pursuant to A.R.S. 13-4051.

Respectfully submitted this 8th day of August, 2000.

BARBARA LAWALL
PIMA COUNTY ATTORNEY

/s/ Kathleen Mayer
KATHLEEN MAYER
Deputy County Attorney
State Bar No.005354
Pima County Attorney's Office
Law Firm No. 69000

Copy mailed/delivered this
8th day of August, 2000 to:

Carol Wittels
Attorney for Defendant

Hon. Howard Fell
Division SR

ARIZONA SUPERIOR
COURT, PIMA COUNTY

CASE NO. CR-12316

JUDGE PRO TEMPORE:
HON. HOWARD FELL
COURT REPORTER: NONE

DATE: August 14, 2000

STATE OF ARIZONA

VS.

LARRY YOUNGBLOOD

---

**MINUTE ENTRY**

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(Filed August 14, 2000)

**ORDER:**

Upon application of the State,

**IT IS ORDERED** that the conviction in this case is hereby vacated and set aside pursuant to A.R.S. § 13-907.

**IT IS FURTHER ORDERED** that the defendant's civil rights, which may have been lost or suspended by the conviction in this case, are hereby restored, and the records pertaining to this conviction are to be cleared pursuant to A.R.S. § 13-4051.

/s/ Howard Fell
HON. HOWARD FELL

CC: Hon. Howard Fell
Criminal Calendaring
County Attorney – Kathleen Mayer
Public Defender – Carol Wittels
Adult Probation
Clerk of Court – Appeals

Clerk of Court – Criminal Desk
Sheriff

/s/ Jerri Romero/cg
Deputy Clerk

CEW: og
August 16, 2000
F9900-1603

LAW OFFICES
PIMA COUNTY PUBLIC DEFENDER
32 N. STONE FOURTH FLOOR, LEGAL SERVICES, BLDG.
TUCSON, ARIZONA 85701
TELEPHONE: (520) 740-8300

CAROL WITTELS #63072

**ATTORNEY FOR DEFENDANT**

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

| | |
|---|---|
| THE STATE OF ARIZONA,<br>Plaintiff,<br>vs.<br>LARRY YOUNGBLOOD,<br>Defendant. | No. CR-68276<br>**ORDER**<br>Honorable Howard Fell<br>Division SR |

Upon motion of the defendant, and good cause appearing therefor,

IT IS HEREBY ORDERED dismissing the above-captioned case with prejudice.

DONE IN OPEN COURT this 21 day of August, 2000.

/s/ Howard Fell
HONORABLE HOWARD FELL
DIVISION SR

Copies of the foregoing to:

CC: **Honorable Howard Fell**
Division SR
**Kathleen Mayer**
Pima County Attorney's Office
**Carol E. Wittels**
Assistant Public Defender
**Criminal Calendar**
**Adult Probation**
**Sheriff – 1 certified**

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(LOGO) College of American Pathologists
325 Waukegan Road,
Northfield, Illinois 60093-2750
800-323-4040 • http://www.cap.org

***Advancing Excellence***

September 17, 2001

John G. Watkins, Esq.
804 South Sixth Street
Las Vegas, Nevada 89101

Reference Number: 707
CAP Number: 2246601

Re: Associated Pathologists Laboratories, Las Vegas, NV

Dear Mr. Watkins:

The College's Commission on Laboratory Accreditation has completed the follow-up to your letter of March 15, 2001. In your letter you raised two issues relating to procedures followed by Associated Pathologists Laboratories (APL) with respect to blood samples taken from your client, Jessica Williams:

1. The use of only one positive control in quantitative drug analysis; and

2. The failure to retain specimens in a frozen state.

We have raised these issues with APL.

The laboratory has now responded. Specifically it has agreed that henceforth it will include two positive controls at the appropriate concentrations for all quantitative drug assays. It has also agreed to store all specimens in refrigerated, limited-access, secure storage facilities. Based on this response, the Commission has determined not to take further action with respect to APL.

We appreciate your bringing this information to our attention. We agree that laboratories should always strive

to maintain high standards of practice in order to provide quality laboratory results for patients. Thank you for your input.

Sincerely,

/s/ Roxanne Schwoch
Roxanne Schwoch
Director of Regulatory and Professional Affairs
Laboratory Accreditation Programs

cc: William B. Hamlin, MD, Chair, Commission on Laboratory Accreditation Gerald A. Hoeltge, MD, Special Commissioner for Complaints